IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. _____

IN RE GRAND JURY APPEARANCE
OF ALVIN S. MICHAELSON, ESQ.

PETITION FOR WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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TOPICAL INDEX

	Page
Table of Authorities	iv
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS	4
STATUTORY PROVISIONS	4
STATEMENT	6
1. Proceedings Below.	6
2. Jurisdiction	7
3. Facts	7
REASONS FOR GRANTING THE WRIT	11
1. Never before has this Court been confronted with a case in which an attorney was held in contempt for failing to disclose to a federal grand jury incriminating information transmitted to him by his criminal defendant client in the course of the attorney-client relationship. However, this case is not an isolated instance, but represents an increasingly common practice of the Justice Department.	

which will only be encouraged if this petition is denied. The Court should therefore promulgate guidelines which will safeguard the right of the accused to assistance of counsel of choice, by insuring that the defendant's attorney cannot be compelled to be a witness against him. The Fifth and Sixth Amendments should prohibit reliance on the attorney-client relationship to accomplish incrimination of the client. 11

2. The decision of the Ninth Circuit Court of Appeal in the instant case directly conflicts with that of the Fifth Circuit in United States v. Kasmir, 499 F. 2d 444 (1974) on the important question of whether an attorney may assert his client's Fifth Amendment privilege against self-incrimination. Mr. Michaelson, an attorney, was ordered to disclose to a federal grand jury information he learned while representing his client in the matter being investigated. The court below failed to recognize this insidious new form of prosecutorial discovery and evasion of the client's protective use immunity. This Court should now resolve this question, which has been the subject of numerous lower court decisions, and which otherwise will generate numerous contempt proceedings as attorneys attempt to protect their clients. 16

3. This Court should resolve the conflict between the decision of the Ninth Circuit in the instant case and that of the Second Circuit in Colton v. United States, 306 F. 2d 623 (1962), on the question of whether the extent of the attorney-client privilege in federal criminal proceedings is governed by state statute or federal common law, in order to prevent forum shopping; and it should determine that the information sought in this case was privileged. Furthermore, this Court should decide whether an attorney should be compelled to divulge the secrets of his client to a federal grand jury, when to do so would expose him to discipline under state laws regulating the conduct of attorneys, and violate the ethical percepts delineated in the American Bar Association Code of Professional Responsibility. 24

4. The 30-day limitation of review of contempt orders issued under 28 U.S.C. §1826, as interpreted by the Ninth Circuit, is unconstitutional. The petitioner was effectively deprived of his right to counsel, guaranteed by the Due Process Clause of the Fifth Amendment. Furthermore, because of the 30-day limitation, the court below disregarded its own rules with respect to rehearing in banc; the three-judge panel which heard the case denied petitioner his right to have each active circuit judge consider whether an in banc redetermination was required in this significant case. 31

CONCLUSION 35

APPENDIX A

TABLE OF AUTHORITIES

Cases	Page
Baird v. Koerner, 279 F. 2d 623 (9th Cir. 1960)	25, 29
Cantillion v. Superior Court, 305 F. Supp. 304 (C. D. Cal. 1969)	14, 15
Charleston v. United States, 144 F. 2d 504 (9th Cir. 1971)	32
Colton v. United States, 306 F. 2d 633 (2nd Cir. 1962) cert. denied 371 U. S. 951 (1963)	3, 24 28
Couch v. United States, 409 U. S. 322 (1973)	17, 22
Crooker v. California, 357 U. S. 433 (1958)	12
Grant v. United States, 227 U. S. 74 1912)	17
Johnson v. United States, 228 U. S. 457 (1913)	17
Kastigar v. United States, 406 U. S. 411 (1972)	22
Maness v. Meyers, ___ U. S. ___, 16 Crim. L. Rprt. 3027 (1975)	23

Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964) 19

Parker v. United States, 153 F.2d 68 (1st Cir. 1946) 32

People v. Canfield, 12 Cal. 3d 699 (1974) 13, 24, 29

Prichard v. United States, 181 F.2d 326 (6th Cir. 1950) 19

In re Semel, 411 F.2d 195 (3d Cir. 1969) 28

Shillitani v. United States, 384 U.S. 364 (1966) 32

Smith v. United States, 360 U.S. 1 (1959) 33

Spevack v. Klein, 385 U.S. 511 (1966) 14

Stewart v. United States, 440 F.2d 954 (9th Cir. 1971) 32

In re Terkeltoub, 256 F.Supp. 693 (S.D.N.Y. 1966) 14

Tillotson v. Boughner, 350 F.2d 663 (7th Cir.(1965) 29

United States v. Cromer, 483 F.2d 99 (9th Cir. 1973) 26, 27 28, 29

United States v. Dinsio,
468 F.2d 1392 (9th Cir. 1972) 31, 32

United States v. Johnson,
318 F.2d 288 (6th Cir. 1963) 12

United States v. Judson,
332 F.2d 460 (9th Cir. 1963) 18

United States v. Kasmir,
499 F.2d 444 (1974) 3, 16, 17
18, 20, 30

United States v. Ladner,
238 F. Supp. 895 (S.D. Miss. 1965) 29

United States v. Nunez,
483 F.2d 453 (9th Cir. 1973) 20, 21

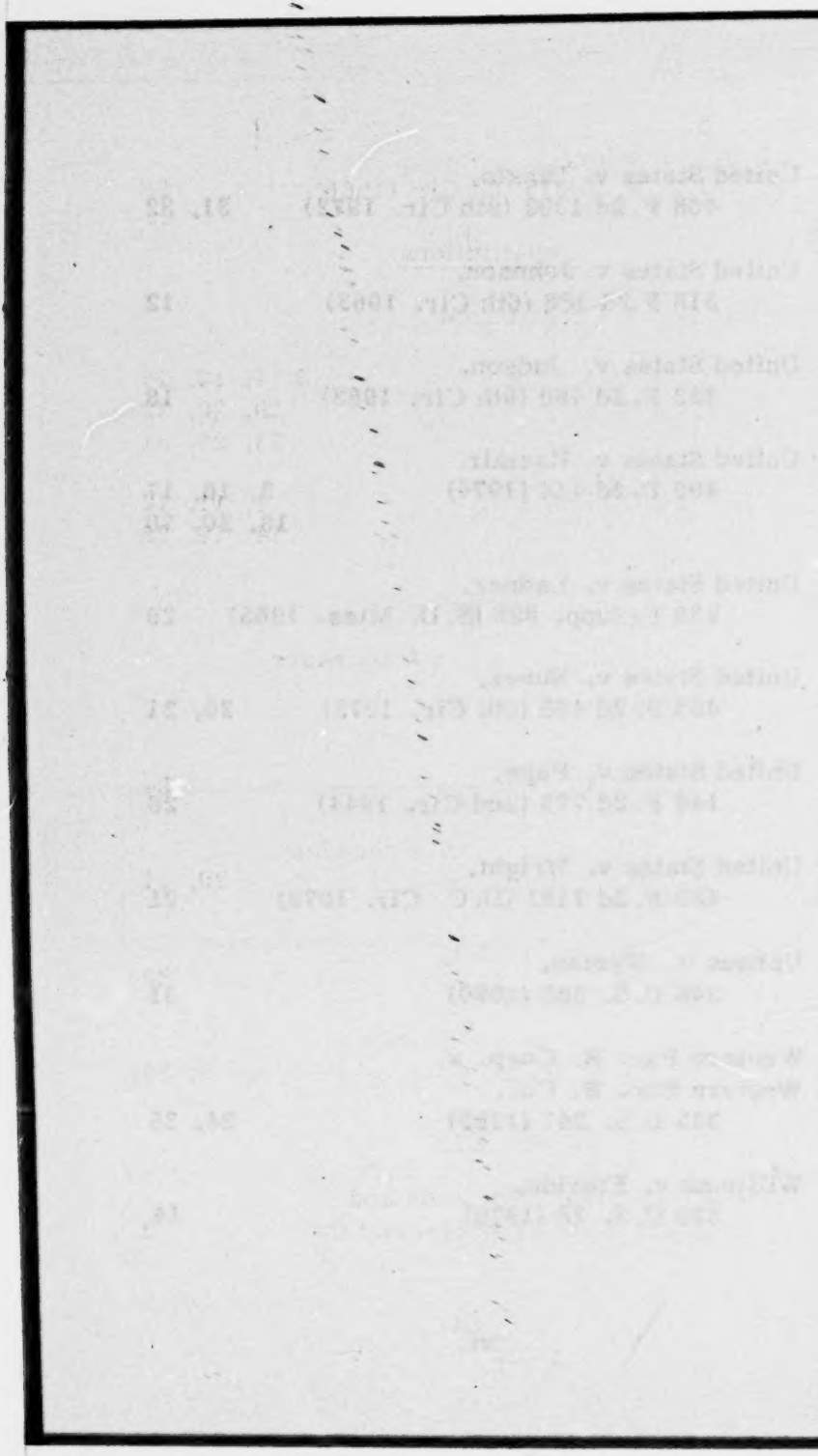
United States v. Pape,
144 F.2d 778 (2nd Cir. 1944) 28

United States v. Wright,
489 F.2d 1181 (D.C. Cir. 1973) 21

Uphaus v. Wyman,
346 U.S. 388 (1960) 31

Western Pac. R. Corp. v.
Western Pac. R. Co.,
345 U.S. 247 (1953) 34, 35

Williams v. Florida,
399 U.S. 78 (1970) 14



Wirtz v. Fowler,
372 F. 2d 315 (5h Cir. (1966) 29

Constitutions

United States Constitution:

Fifth Amendment 3, 4, 10, 16
19, 20, 22
23, 26, 31

Sixth Amendment 4, 11, 12
14, 19, 26

Rules

Federal Rules of Appellate Procedure

Rule 4(b) 7

Rule 35(b) 34

Federal Rules of Criminal Procedure
Rule 16(c) 20, 21

Federal Rules of Evidence
Rule 501 25

Supreme Court Rules of Nevada,
Section 1, Rule 179 9, 29

Statutes

State of California Business and
Professions Code §§6068(a) and (h) 9

Nev. Rev. Stat.

Section 49.055 — 9, 27

Section 49.095 — 9, 27

18 U.S.C.:

Section 6002 — 4, 6, 10, 22

28 U.S.C.:

Section 1826 — 3, 5, 6, 8, 31, 32

Section 1826(a) — 31, 32

Section 1826(b) — 7

Section 1254(1) — 2, 7

Section 1291 — 7

Section 1294 — 7

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PETITION FOR WRIT OF
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Alvin S. Michaelson, Esq., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported; a typed opinion was filed on January 22, 1975. A copy of the opinion is appended to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1975; a written opinion followed on January 22, 1975; and a petition for rehearing and rehearing in banc was summarily denied on January 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May a criminal attorney be compelled to answer questions before a grand jury, when the answers will incriminate his client whom he is currently representing in a criminal matter, and when the information sought was acquired in the course of the attorney-client relationship? Answering the questions would destroy the trust necessary to maintain the attorney-client relationship and necessarily preclude him from further representing his client since he is a potential prosecution witness. If he declines to answer, he will be incarcerated. In any event, he will no longer be able to represent his client. May a criminal defendant thus be effectively deprived of counsel of her choice, and may the exercise of the right to retain counsel carry the penalty that the information furnished counsel may be discovered and exploited by the prosecution?

2. May a criminal attorney assert his client's Fifth Amendment Privilege against Self-Incrimination, before a grand jury investigating his client, with respect to information he acquired while representing his client in the very matter under investigation by the jury? On this question, the decision of the Ninth Circuit in the instant case conflicts with that of the Fifth Circuit in United States v. Kasmir, 499 F. 2d 444 (1974), and with numerous cases prohibiting prosecutorial discovery.

3. Whether, in accordance with Colton v. United States, 306 F. 2d 633 (2nd Cir. 1962), the extent of the attorney-client privilege is a matter of federal common law, or whether, as the Court of Appeals asserted in the instant case, it is one of state law; whether, in either case, the information sought in this case was protected by the attorney-client privilege; and whether, if not protected by the attorney client privilege, the petitioner could refuse to disclose the information because to do so would violate the ethical precepts of his profession and the laws of the state in which he is licensed to practice?

4. Whether the ambiguous 30-day limitation on review incorporated into 28 U. S. C. §1826 requires the Court of Appeals to decide an appeal of a contempt order within 30 days; if so, whether that requirement deprived petitioner of his right to Due Process under the Fifth Amendment; if the appeal must have been decided within that period, was petitioner further deprived of his right to Due Process by the disregard by the Court of Appeals of its own rules with respect to

rehearing in banc; and should petitioner have been permitted to petition each circuit judge for such a rehearing?

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; . . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATUTORY PROVISIONS

18 U.S.C. §6002 provides in pertinent part:

> "Whenever a witness refuses, on the basis of his privilege against self incrimination, to testify or provide other information in a proceeding before or ancillary to --

"(1) a court or grand jury or the United States, . . .

"and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

28 U.S.C. §1826 provides in pertinent part:

"§1826. Recalcitrant witnesses

"(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify . . . the court . . . may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony. . . .

". . .

"(b) . . . Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

STATEMENT

1. Proceedings Below.

Petitioner Alvin S. Michaelson, Esq., an attorney, was cited for contempt by the District Court for the District of Nevada, on December 5, 1974, because he refused to answer questions before a grand jury after use immunity had been granted to him and his client under 18 U.S.C. §6002. The contempt order was issued under 28 U.S.C. §1826, [1] and the petitioner was released on bond while he appealed the order. On January 6, 1975, the United States Court of Appeals for the Ninth Circuit affirmed the order by an unpublished per curiam memorandum, in which Judge Merrill reserved the right to dissent; the order also purported to foreclose petitioner's opportunity to seek rehearing or rehearing in banc. [2] A petition for rehearing and suggestion

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1/ The order, per Bruce R. Thompson, J., appears at n. 1 to the opinion of the Ninth Circuit, which is appended to the petition.

2/ Ninth Circuit Opinion, at 2 (hereinafter, "Opinion").

for rehearing in banc was timely filed on January 20, 1975, but was summarily denied on January 29, 1975, by the same three judge panel that decided his initial appeal. The written opinion of the panel was filed on January 22, 1975, Judge Merrill dissenting.

2. Jurisdiction

The jurisdiction of this Court rests upon 28 U.S.C. §1254(1). Appellate jurisdiction was vested in the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §§1291 and 1294; Rule 4(b) of the Federal Rules of Appellate Procedure; and limited by 28 U.S.C. §1826(b); notice of appeal from the order of the United States District Court for the District of Nevada was seasonably filed on December 5, 1974.

3. Facts.

Petitioner Alvin S. Michaelson, Esq., an attorney, refused to answer questions before a federal grand jury in the District of Nevada, on the grounds that the answers would incriminate his client, Ms. Branda Sibson, and that they therefore infringed on her Constitutional rights. He also believed that answering the questions would violate his own obligations under the attorney-client privilege and under the ethical and statutory precepts governing his professional

conduct.[3/] After both Mr. Michaelson and Ms. Sibson had been granted "use" immunity under 18 U.S.C. §1826, he still declined to answer the questions; petitioner was held in contempt by Nevada Federal Judge Bruce R. Thompson, and ordered confined until he

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3/ The questions were: (1) "[P]rior to meeting Miss Sibson, did anyone make contact with you?" [Grand Jury Proceedings Transcript, 8 (hereinafter "G.J.")]; (2) "Did anyone refer Miss Sibson to you?" (3) "Did you discuss a fee arrangement with Miss Sibson?" (4) "Did any other individual besides Miss Sibson ever discuss with you a fee arrangement for your representation of Miss Sibson?" (5) "What is your fee arrangement with Miss Sibson?" (G. J., 8) (6) "How much money have you received from Miss Sibson?" (7) "Have you received any money from any other person besides Miss Sibson to represent Miss Sibson?" (8) "Have you received any funds from Miss Sibson?" (9) "Have you made arrangements with Miss Sibson to pay your expenses?" (10) "Have you made an arrangement with any other person besides Miss Sibson for the payment of your expenses to represent her?" (G. J. 9); (11) "When did you first meet Miss Sibson?" (G. J. 47); (12) "[O]n the first occasion you met with her here and she had another attorney; is that not correct?" (13) "Did anyone contact you prior to you meeting Miss Sibson?" (14) "Has anyone contacted you prior to Miss Sibson contacting you?" (15) "Have you made any arrangement for payment with anyone besides Miss Sibson?" (G. J. 49)

answered the questions or until the term of the grand jury expired. 4/

Before declining to answer the questions, Mr. Michaelson was informed by James Duff, Esq., of the Department of Justice, that his answers would be used both to incriminate Ms. Sibson on the substantive offenses underlying the grand jury investigation, and also to demonstrate that Ms. Sibson had perjured herself before the grand jury. 5/ From that

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4/ The various grounds are set forth at Opinion 5-6. They include Ms. Sibson's rights under the Fifth and Sixth Amendments; the Fourth Amendment rights to privacy, and the attorney client privilege; and the requirements of the American Bar Association canons of professional responsibility, State of California Business and Professions Code, §§6068(e) and (h), Nevada Revised Statute §§49.055 and 49.095, and Section 1, Rule 179 of the Supreme Court Rules of Nevada.

The term of the grand jury will expire in approximately nine months.

5/ This information was included in an affidavit submitted by petitioner, and was confirmed by government attorneys at the oral argument of the appeal before the Ninth Circuit. Because of the breakneck speed with which this case has been decided, there is as yet no record on appeal to which more precise reference might be made.

information, it was clear that use immunity would not sufficiently protect his client's privilege against self-incrimination. Although she was insulated from the use of her own testimony, she had no protection from the use of his. The information sought by the grand jury could have provided evidence against her on the charges underlying the grand jury investigation. The fact that someone had paid her legal fees could be used as evidence to show that she was a member of a conspiracy, and the name of a person who paid her fees or referred her to Mr. Michaelson would lead to co-conspirators who would be witnesses against her. Moreover, use immunity under 18 U.S.C. §6002 explicitly exempts perjury from the protection of immunity, so that Ms. Sibson's Fifth Amendment privilege was intact with respect to the perjury charges. The information sought by the grand jury was acquired as a result of the attorney-client relationship with Ms. Sibson, and Mr. Michaelson therefore believed that he could assert her privilege against self-incrimination.

Mr. Michaelson also recognized that his client would be threatened with more than incrimination if he could be compelled to answer the questions. His ability to represent Ms. Sibson would be destroyed, and her right to counsel of her choice denied whether he answered the questions or went to jail for refusing to do so. If he answered them, he might be forced to testify against her, in which case he could no longer represent her, or, at the very least, the trust and confidence at the heart of the effective attorney-client relationship would be vitiated.

And obviously, if he were incarcerated, he could not continue to represent his client. Finally, if lawyers could be compelled to reveal information gained from their clients as a result of the attorney-client relationship, it would make all criminal defendants exceedingly reluctant to exercise their rights under the Sixth Amendment.

REASONS FOR GRANTING THE WRIT

1. Never before has this Court been confronted with a case in which an attorney was held in contempt for failing to disclose to a federal grand jury incriminating information transmitted to him by his criminal defendant client in the course of the attorney-client relationship. However, this case is not an isolated instance, but represents an increasingly common practice of the Justice Department, which will only be encouraged if this petition is denied. The Court should therefore promulgate guidelines which will safeguard the right of the accused to assistance of counsel of choice, by insuring that the defendant's attorney cannot be compelled to be a witness against him. The Fifth and Sixth Amendments should prohibit reliance on the attorney-client relationship to accomplish incrimination of the client.

This novel case has at its heart a complex interweaving of constitutional principles; yet the result of permitting the opinion of the Court of Appeals to stand may be articulated with alarming simplicity. Requiring petitioner to disclose the

demanded information would destroy his relationship with his client, depriving her of her right to counsel of choice under the Sixth Amendment. Ultimately, if the government is encouraged by a denial of this petition to continue to engage 6/ in the practices to which petitioner objects, attorneys will be reluctant to practice criminal law, and clients will be even more reluctant to retain them.

The Sixth Amendment guarantee of assistance of counsel embodies both the right to effective representation and the right to counsel of the defendant's own choice. United States v. Johnson, 318 F.2d 288, 291 (6th Cir. 1963); see Crooker v. California, 357 U.S. 433, 439 (1958). Ms. Sibson will be denied both those rights if the information sought of Mr. Michaelson may be compelled.

Frequently, the very first discussions between an attorney and his client concern the manner in which the client selected the attorney and various financial arrangements. Ms. Sibson clearly intended that the information be confidential, and expected that it would remain so, as was demonstrated by her own unwillingness to testify about it before the grand jury. Forcing

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6/ Counsel for petitioner has been informed that the practice of calling attorneys before grand juries to incriminate their clients is increasingly common; this decision will undoubtedly encourage the government to do so more often.

Mr. Michaelson to testify would dispell the delicate aura of trust and confidence which is the foundation of the attorney-client relationship, for

> "it is clear that if an accused is informed that the first information he provides an attorney is not privileged, he would not have the trust in his counsel so essential in providing effective representation."

People v. Canfield, 12 Cal. 3d 699, 705 (1974) (The Canfield court unanimously held that it was error to admit against an indigent criminal defendant financial information he provided the public defender to show that he could not afford to retain counsel.)

More than mere trust or confidence is at stake. Petitioner's coerced testimony may be used against Ms. Sibson at trial, either on charges arising from the underlying subject matter of the grand jury investigation, or on perjury charges arising from her testimony. Forcing Mr. Michaelson to answer the questions will therefore terminate his relationship with Ms. Sibson. If he becomes a witness against her, he will be unable to represent her. If he is incarcerated for failure to testify, he will physically be unable to render further assitance to her. In either case, she will have been denied effective representation by counsel of her choice. Any new counsel substituted for Mr. Michaelson would find himself "in exactly the same position as petitioner now finds himself."

Cantillon v. Superior Court, 305 F. Supp. 304 (C.D. Cal. 1969). 7/

Ms. Sibson has been put to a constitutionally impermissible choice. By retaining counsel, she will expose herself to any incriminating evidence which may be extracted from him. Yet, as the Sixth Amendment recognizes, she needs counsel to insure that her rights are protected. No such dilemma should accompany the exercise of her Sixth Amendment rights. See, Spevack v. Klein, 385 U.S. 511, 515 (1966).

The Court of Appeals (Opinion, 14) doubted that any chilling effect on the exercise of Sixth Amdnement rights which would follow this decision would be of constitutional dimension. 8/ Yet

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7/ Cantillon concerned the duty of an attorney to disclose the names of alibi witnesses and was remanded for reconsideration in view of Williams v. Florida, 399 U.S. 78 (1970), in 442 F.2d 1338 (9th Cir. 1971).

8/ Other courts have found a chilling effect resulting from compelling an attorney to testify about information acquired as a result of the attorney-client relationship. In re Terkeltoub, 256 F. Supp. 693 (S.D.N.Y. 1966) upheld a lawyer's refusal to testify about his presence when his client may have made a telephone call to a third person. The court held that the attorney-client privilege was inapplicable because the conversation pertained to future illegal acts, but that the attorney was shielded by his client's Sixth Amendment right to representation. The

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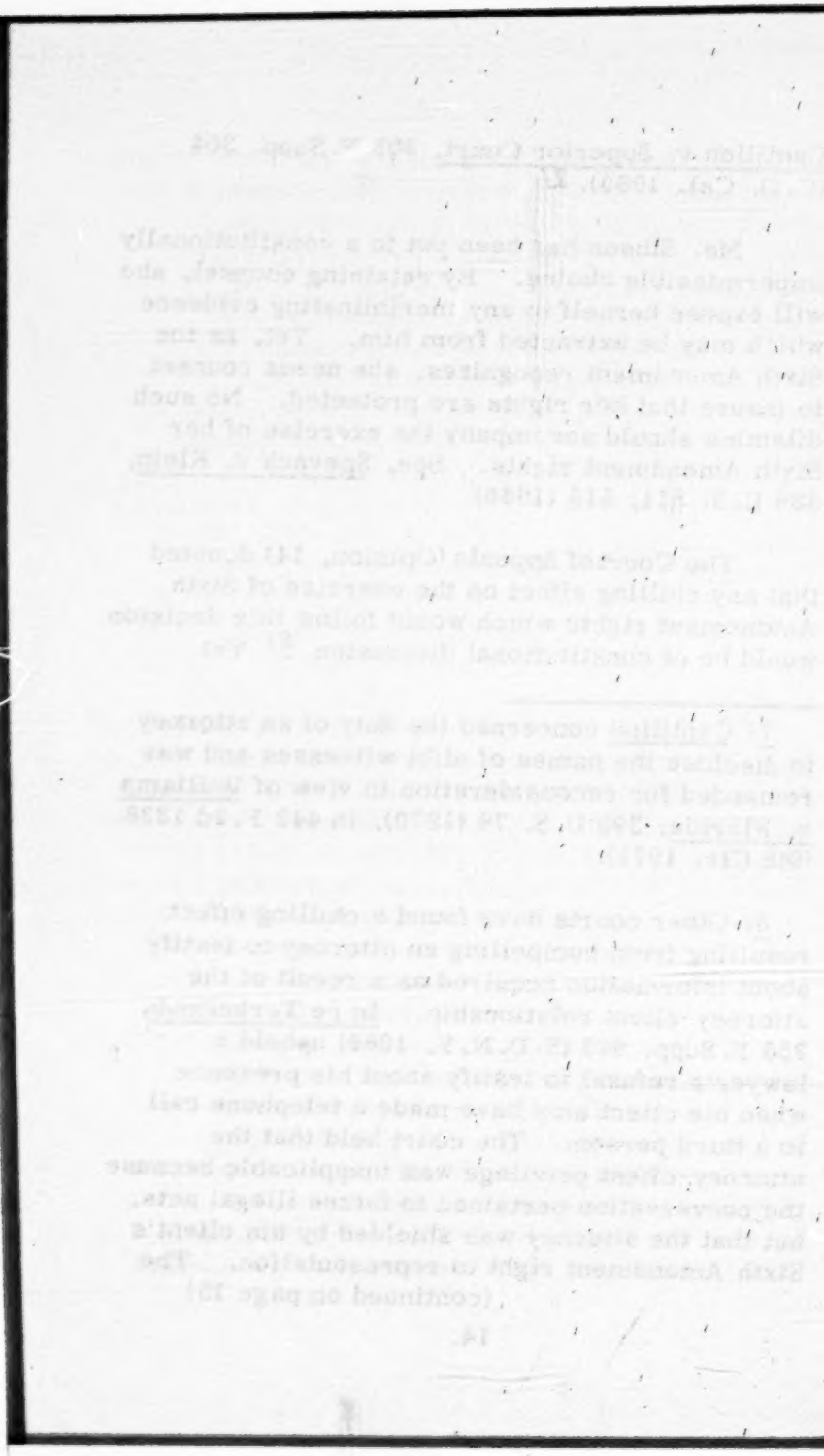

defendants will realize that they might better decide to represent themselves than to retain counsel, for which reason alone the decision must be reversed. Cantillon v. Superior Court, supra, 305 F. Supp. at 309. The chilling effect of the panel's ruling will also extend to the process by which potential defendants learn about prospective counsel. It would be naive to imagine that criminal defendants (or many other clients) find their lawyers through reference to the yellow pages. Instead, new clients are referred by satisfied former clients, or by those familiar with the lawyer's ability and practice.

8/ (continued from page 14)

court also alluded to the "chilling impact" such testimony would have on the lawyer's ability and obligation to work untrammeled in investigating and preparing his client's defense.

The Court of Appeals' conclusion that disclosure of at least the fee arrangement was necessary to insure that no conflict existed between a client and whomever paid the fee is unpersuasive. There is no showing that Ms. Sibson was unaware of the fee arrangement. Moreover, there was no question of Mr. Michaelson's loyalty to his client. Even if such a question arose, however, the proper forum for its investigation and resolution is not a grand jury proceeding. A court concerned about the possibility of conflict might hold an in camera hearing to determine whether the conflict exists.

In the case of criminal defendants, most referrals are by people who have had some encounter with the criminal law. Understandibly, these people do not wish their names revealed to a grand jury, nor do the new clients wish their connection with the old publicized. If the connections between them are relevant to a criminal investigation, they must be discovered by means other than interrogating the attorney, or the practice of criminal law will be made untenable. Requiring lawyers to testify will give them the unhappy choice of losing their clients' trust because they have testified before the grand jury, losing their clients because they are in jail for failure to testify, or seeing them convicted based upon the attorney's testimony.

2. The decision of the Ninth Circuit Court of Appeals in the instant case directly conflicts with that of the Fifth Circuit in United States v. Kasmir, 499 F. 2d 444 (1974) on the important question of whether an attorney may assert his client's Fifth Amendment privilege against self-incrimination. Mr. Michaelson, an attorney, was ordered to disclose to a federal grand jury information he learned while representing his client in the matter being investigated. The court below failed to recognize this insidious new form of prosecutorial discovery and evasion of the client's protective use immunity. This Court should now resolve this question, which has been the subject of numerous lower court decisions, and which otherwise will generate numerous contempt proceedings as attorneys attempt to protect their clients.

Although the question has never been squarely confronted by this Court, 9/ the "weight of authority and reason supports the position that an attorney may claim the self-incrimination privilege on behalf of his client." United States v. Kasmir, 490 F.2d 444, 454 (5th Cir. 1974). Generally, the "personal" nature of the privilege, Couch v. United States, 409 U.S. 322, 328 (1973), 10/ protects a person only "from producing the evidence but not from its production," Johnson v. United States, 228 U.S. 457, 458 (1913), and therefore "does not proscribe incriminating statements elicited from another." Couch v. United States, supra, 409 U.S. at 328.

The unique relationship between an attorney and his client demands that an exception be carved out to the general rule:

> "No other 'third party,' nor 'agent,' nor 'representative' stands in such a unique relationship between

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9/ But see, Grant v. United States, 227 U.S. 74, 79080 (1912), in which the Court suggests that Grant could not claim the privilege against self-incrimination on behalf of his client only because his client was himself unable to assert the privilege with respect to corporate records.

10/ Couch denied the vicarious privilege to an accountant.

the accused and the judicial process as does his attorney. He is the only person who is permitted to prepare and conduct the defense of the matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and the proceedings which call for its production that any distinction is mere sophistry." United States v. Judson, 332 F.2d 460, 467 (9th Cir. 1963). 11/

11/ In both Judson and Kasmir, attorneys successfully asserted their clients' privilege against self-incrimination. Both cases involved the subpoena of tax related documents, and both relied on the unique relationship between attorney and client within the constitutional scheme. Significantly, Kasmir was decided in light of Couch, yet still permitted vicarious assertion of the privilege. Furthermore, the evidence suppressed in Judson and Kasmir was not even arguably subject to the attorney-client privilege, as it was tangible evidence of the commission of a crime. Therefore, the argument for permitting an attorney to assert his client's privilege is stronger in the case at bar, since the grand jury seeks the contents of communications intended to be kept confidential, which were contemporaneous with the creation of the attorney-client relationship, and are probably therefore within the attorney client privilege.

In civil litigation, the relationship between an attorney and his client is protected only by extensive rules of privilege. Complex laws and procedures require that untutored litigants be represented by counsel, and the right to retain an attorney is unquestioned. The function of the attorney-client privilege is to allow the attorney to gain the confidence of his client, and fully represent his best interests. See, Prichard v. United States, 181 F.2d 326 (6th Cir. 1950). In a criminal case, however, representation is not only desirable, but required by the Sixth Amendment. To fulfill his constituional obligations, an attorney must investigate the case and he consequently will become privy to much information which may incriminate his client. If the information is obtained from third persons, it is not protected by the common law attorney-client privilege. Nevertheless, if that information were in the possession of the defendant, he could not be compelled to reveal it, for the Fifth Amendment requires the government "in its contest with the individual to shoulder the entire load." Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55 (1964).

The attorney should also be protected from revealing the information he obtains as a result of the attorney-client relationship. The defendant's rights and privileges under the Fifth Amendment should not be decreased by his exercise of rights under the Sixth.

United States v. Kasmir, supra, 490 F. 2d at 452. 12/

12/ Although the assertion by the attorney of his client's Fifth Amendment privilege before a grand jury may be unfamiliar, the nature of the principles justifying it may be understood when it is observed that the grand jury questions were in fact prosecutorial discovery at an early stage of criminal proceedings. Under Rule 16(c) of the Federal Rules of Criminal Procedure, discovery by the government is conditioned on defense discovery, is limited to materials "which the defendant intends to produce at the trial," and specifically excludes "statements made by the defendant . . . to . . . his agents or attorneys." Of course, no defense discovery had yet occurred in the instant case, nor did Ms. Sibson intend to introduce any of the information sought at any trial.

Although phrased in terms of the circumstances and conversations surrounding the retainer of Mr. Michaelson, the questions asked by the grand jury were part of a government search for the names of potential prosecution witnesses and co-conspirators. The name of a person interested enough in Ms. Sibson's case to become involved in securing legal services for her would lead to co-conspirators who would be witnesses against Ms. Sibson. Moreover, the very fact that someone else paid her fees might have been used as evidence to show that she was part of a conspiracy. United States

(continued on page 21)

The Ninth Circuit, in deciding this case, departed from the rule that an attorney may

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12/ (continued from page 20)

v. Nunez, 483 F. 2d 453, 461 (9th Cir. 1973). (In Nunez, evidence that the defendant had secured bail for three men he claimed not to know was introduced as evidence of his involvement in a conspiracy, on the theory that he would not risk his money for strangers. Evidence of the circumstances surrounding payment of Ms. Sibson's fee could be similarly used in this case.)

> "The defendant has a right under the Fifth Amendment to compel the state to investigate its own case, find its evidence, and prove its own facts. The defense has no duty to help the prosecution convict the defendant."

United States v. Wright, 489 F. 2d 1181 (D. C. Cir. 1973) (Defense investigator could not be compelled to turn over his report to the prosecution for impeachment purposes. The court found the possibility shocking, raising serious constitutional questions. If an investigator who is not an attorney may not be compelled to produce evidence for the government, it would seem incredible that a defendant's attorney would be required to do so.) Rule 16(c) and the cases prohibiting prosecutorial discovery implicitly recognize the identity of the attorney and client in criminal cases. Information which may not be obtained from a defendant may not be obtained from his attorney.

assert his client's Fifth Amendment rights. Two reasons were given for its rejection of the petitioner's arguments. The first, the personal nature of the privilege, was explained by an extensive quotation from Couch v. United States, Opinion, 6-8, and has been refuted. The Court of Appeals also suggested that, even if an attorney might assert his client's privilege against self-incrimination in some circumstances, he could not do so if the client's privilege had been circumscribed by waiver or a grant of immunity. Noting that both Ms. Sibson and Mr. Michaelson had been granted "use" immunity, the Court concluded that neither could invoke the privilege.

That holding ignored the facts of the case. By its own admission, the government expected to use the testimony of Mr. Michaelson not only in connection with the underlying subject matter of the grand jury inquiry, but for investigating the possibility that Ms. Sibson had committed perjury before the grand jury. 18 U.S.C. §6002 explicitly excludes perjury from the protection of immunity extended under it; therefore, Ms. Sibson's privilege against self-incrimination was intact with respect to any testimony that might incriminate her of perjury.

The Court also noted that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination." Kastigar v. United States, 406 U.S. 441, 453 (1972); with respect to the testimony of any witness asserting his own privilege against self-incrimination, that statement accurately reflects the law. However, when an attorney asserts

assert his client's Fifth Amendment rights. Two reasons were given for its rejection of the petitioner's arguments. The first, the personal nature of the privilege, was explained by an extensive quotation from Couch v. United States, Opinion, 6-8, and has been refuted. The Court of Appeals also suggested that, even if an attorney might assert his client's privilege against self-incrimination in some circumstances, he could not do so if the client's privilege had been circumscribed by waiver or a grant of immunity. Noting that both Ms. Sibson and Mr. Michaelson had been granted "use" immunity, the Court concluded that neither could invoke the privilege.

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the privilege on behalf of his client, the protection is broader. The client must be protected against incriminating statements made by his attorney, based on information obtained as a result of the attorney-client relationship. Because the statute makes no provision protecting the client from the use of her attorney's testimony, the protection offered to Mr. Michaelson was insufficient to relieve him of the obligation to assert his client's Fifth Amendment privilege. 13/

13/ At the conclusion of its opinion, the Court of Appeals acknowledged that it might not countenance the use of Mr. Michaelson's statements against Ms. Sibson, and claimed that the question of their use had not been reached. However, the Supreme Court has recently held that a person need not comply with an order to reveal information, and rely on normal appellate channels for vindication. Instead, he may refuse to comply, because "compliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released." Maness v. Meyers, ___ U.S. ___, 16 Crim. L. Rprt. 3027 (1975). Such noncompliance and appeal of the resulting contempt order is "particularly appropriate where the Fifth Amendment privilege against self-incrimination is involved." Ibid. The very basis for Mr. Micahelson's refusal to answer was his belief that the information would tend to incriminate his client, and that it would so be used. The issue should have been resolved.

3. This Court should resolve the conflict between the decision of the Ninth Circuit in the instant case and that of the Second Circuit in Colton v. United States, 306 F.2d 623 (1962), on the question of whether the extent of the attorney-client privilege in federal criminal proceedings is governed by state statute or federal common law, in order to prevent forum shopping; and it should determine that the information sought in this case was privileged. Furthermore, this Court should decide whether an attorney should be compelled to divulge the secrets of his client to a federal grand jury, when to do so would expose him to discipline under state laws regulating the conduct of attorneys, and violate the ethical precepts delineated in the American Bar Association Code of Professional Responsibility.

The extent of the attorney-client privilege is not absolutely fixed. Rather, whether particular information is privileged depends on the circumstances under which it is sought and by which the attorney acquired it. See, People v. Canfield, 12 Cal.3d 699, 708 (1974) (Sullivan, J., concurring). Although privilege in federal criminal cases is almost certainly a question of federal common law, Colton v. United States, 306 F.2d 633, 636 (2nd Cir. 1962), no harm would have resulted from the correct application of Nevada law in the instant case. 14/ However,

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14/ The laws of California, Nevada, and the Federal Courts are nearly identical with respect to the extent of the attorney-client privilege.

(continued on page 25)

the court below erroneously interpreted the Nevada law, and the information sought of

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14/ (continued from page 24)

Although Baird v. Koerner, 279 F.2d 623 (1960) created the Ninth Circuit rule that the District Court should apply the privilege law of the state in which it sits, that rule was erroneous and will be limited principally to diversity cases by the new Federal Rules of Evidence, Rule 501. The federal common law of privilege should and will apply in federal criminal proceedings. Applying the law of the forum would encourage forum shopping. For example, in the instant case, the law of California would have held that the arrangements between Mr. Michaelson and his client were protected by the attorney-client privilege. If the court below were correct, Nevada law would be different, and the government might evade the stricter California standard by conducting its investigations in Nevada. In a mail fraud case involving several states, the government would convene a jury in the state with the laxest privilege rules, causing severe hardship to defendants and seriously threatening their relationships with their attorneys.

In the absence of a uniform rule for all federal courts, the court below should not have assumed that the law of Nevada should apply. Mr. Michaelson is a member of the California Bar, and his relationship with Ms. Sibson

(continued on page 26)

Mr. Michaelson was privileged. Despite the fact that the Court of Appeals was principally concerned with the privilege question, it should be reiterated that the lower court's analysis ignored the denigration of the client's Fifth and Sixth Amendment rights, which exist independently of the attorney-client privilege. 15/

The Court of Appeals relied principally on United States v. Cromer, 483 F. 2d 99 (9th Cir. 1973) for the definitive delineation of the attorney

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14/ (continued from page 25)

originated there. Should he violate the ethical requirements for California legal practice, he will be disciplined in California. The State of Nevada has little interest in seeing its rules of privilege applied to a California attorney-client relationship in Nevada Federal court, nor would that satisfy the expectations of the parties. A better rule would apply the law of privilege of the state in which the attorney-client relationship arose.

15/ In his dissent, Judge Merrill did not feel time permitted him to decide the privilege questions, but he clearly understood that the extent of the attorney-client privilege was only one of several issues in the case. Regardless of of the decision on the privilege question, he could not tolerate the "reliance upon the attorney-client relationship to accomplish incrimination of the client." Opinion, 18.

client privilege in Nevada Federal Court. Cromer, however, provides no foundation for the decision below.

Under the provisions of Nev. Rev. Stat. §49.095,

> "A client has a privilege to refuse to disclose and to prevent any other persons from disclosing confidential communications:
> "1. Between himself or his representative and his lawyer or his lawyer's representative."

The term "confidential communication" is defined in Nev. Rev. Stat. §49.055 as one "not intended to be disclosed to third persons." (Emphasis added.) The question of whether or not a communication is confidential and privileged therefore turns on the intent of the client. In the instant case, the desire of the client to keep the communications and circumstances surrounding the retainer confidential is demonstrated by her own unwillingness to testify about them before the grand jury.

Cromer stands only for the proposition that, under its facts, the information sought did not fall within the attorney client privilege, because it was not confidential. United States v. Cromer, supra, 483 F.2d at 102. There was no justification for elevating that finding of fact to a general principle of law, as the Court of Appeals did in the instant case, Opinion 6-8, because the information and the context in which

it was sought were different from those in Cromer. During a tax investigation, Cromer was asked about the fees paid to him by those under investigation for legal services. The amount of the fees had not been intended to be confidential at the time they were paid, nor did the questions go beyond the amount of the fees.

Therefore, instead of applying the general rule that the information obtained at the threshold of the attorney-client relationship, such as the name of the client or the amount of the fee, is normally unprivileged (Colton v. United States, supra, 306 F.2d at 637), the Court below should have recognized the exceptional circumstances before it. 16/ When that "first information he

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16/ The other cases relied on by the court below restate the general rule, in situations wholly unlike that in the instant case (Opinion, 8). In re Semel, 411 F.2d 195 (3d Cir. 1969). The names of and fees owed by clients must be provided by a bankrupt attorney to his creditors; such information is unprotected without "unusual" circumstances. There was no question of incriminating the clients, nor any showing that the amounts were intended to be confidential, nor that any ongoing attorney-client relationships would be adversely affected. United States v. Pape, 144 F.2d 778 (2nd Cir. 1944). Pape paid attorney's fees for another, but Pape could not claim the attorney-client privilege. Colton v. United States, supra, 306 F.2d 633 (2nd Cir. 1962), cert. denied 371 U.S. 951 (1963). The

(continued on page 29)

provides an attorney," People v. Canfield, 12 Cal. 3d 699, 705 (1974), will incriminate the client, he intends it to be confidential, and the attorney-client privilege protects that information. Baird v. Koerner, 279 F. 2d 623 (9th Cir. 1960) (even the name of the client may be withheld from the government when it seeks the name for possible criminal prosecution). Tillotson v. Boughner, 350 F. 2d 663 (7th Cir. 1965) ("[A]n attorney may not be compelled, at the instance of a hostile litigant, to disclose his retainer or the nature of the transaction to which it related, when such information could be made the basis of a suit against his client.")

The attorney-client privilege is not the only legal limitation on the decision of an attorney to reveal information provided him by a client. Cromer and the court below ignored Section 1, Rule 179 of the Supreme Court Rules of Nevada, which commands an attorney not to divulge a client's "secrets or confidences." United States v. Ladner, 238 F. Supp. 895 (S. D. Miss. 1965)

16/ (continued from page 28)

identity of the client may not be withheld unless its disclosure would be prejudicial. Wirtz v. Fowler, 372 F. 2d 315, 332-3 (5th Cir. 1966). The identity of the client concealed, but no showing that the client considered that the information was confidential, or that he wished to invoke the privilege.

relied on a similar provision of Mississippi law in approving an attorney's refusal to reveal the dates and amounts of payments for legal services. In United States v. Kasmir, supra, 499 F. 2d 444 (5th Cir. 1974), the court upheld an attorney's refusal to answer questions about the delivery of documents to him by his client on the basis of a comparable provision in ABA Code of Professional Responsibility, DR-4-101 (A), (b)(1). A client's "secrets" may not be within the attorney-client privilege, but are nevertheless protected from disclosure and include

> "information gained in the professional relationship which the client has requested be held inviolate or the disclosure of which would be embarassing or would likely be detrimental to the client." United States v. Kasmir, supra, 499 F. 2d at 453.

An attorney's failure to abide by the state requirements for professional conduct may lead to discipline by state bar authorities. Yet the decision of the Ninth Circuit has placed the petitioner in the anomalous position of having to choose between contempt and possible disbarment. As Judge Merrill stated in his dissent, Opinion 19,

> "Voluntary revelation of such information by the attorney surely would be regarded as a breach of professional ethics. I cannot accept the view that the courts are duty bound in every

case to coerce such breach through power of the civil contempt sanction."

4. The 30-day limitation on review of contempt orders issued under 28 U.S.C. §1826, as interpreted by the Ninth Circuit, is unconstitutional. The petitioner was effectively deprived of his right to counsel, guaranteed by the Due Process Clause of the Fifth Amendment. Furthermore, because of the 30-day limitation, the court below disregarded its own rules with respect to rehearing in banc; the three-judge panel which heard the case denied petitioner his right to have each active circuit judge consider whether an in banc redetermination was required in this significant case.

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28 U.S.C. §1826(a), providing for confinement of a witness who refuses to testify, requires that an "appeal" from the order be disposed of within 30 days. A contempt order under §1826 (a) is nominally "civil," despite the indefinite imprisonment; consequently, it has been held not to invoke all the protections of the Bill of Rights. Uphaus v. Wyman, 346 U.S. 388, 403-04 (1960). Nevertheless, the contemnor must be afforded a "real opportunity to meet the just-cause criterion of Section 1826(a)," by means within the "rudimentary concepts of fair play" embodied in the due process clause of the Fifth Amendment. United States v. Dinsio, 468 F.2d 1392 (9th Cir. 1972).

The parameters of due process protections under §1826(a) have not been exactly defined. The "usual requirements" which must be met, Shillitani v. United States, 384 U.S. 364, 371 (1966), include adequate notification of the choices and consequences facing the witness, Parker v. United States, 153 F.2d 68, 70 (1st Cir. 1946), and the opportunity for the witness to receive "an uninhibited adversary hearing in which she can develop her proof that she had just cause to refuse the grand jury's demand." United States v. Dinsio, supra, 468 F.2d at 1394. These two rights necessarily imply that the right to counsel also exists, for without it the adversary hearing, turning on complex questions of Constitutional law, would be meaningless, and a witness would have little chance of understanding his options. The availability of counsel is a factor considered by the courts in determining whether due process was satisfied. Stewart v. United States, 440 F.2d 954, 957 (9th Cir. 1971).

The thirty-day rule of §1826, as applied by the Ninth Circuit, 17/ denied petitioner his

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17/ The 30-day provision of §1826 is ambiguous, as was intimated in Charleston v. United States, 144 F.2d 504, 506 (9th Cir. 1971):

> "Assuming, but not deciding, that the thirty-day limit thus prescribed pertains to disposition of the appeal in the court of

(continued on page 33)

right to due process, including effective representation of counsel during his appeal. Mere speed is never an essential ingredient of justice, and it must fall to the requirements of due process. Smith v. United States, 360 U. S. 1, 10 (1959).

The district court contempt order was issued on December 5, 1974. He was informed on December 18, 1974, that his opening brief was due on December 23, because of the 30-day limitation. As a result, appellant, who had no intention of representing himself, prepared his own opening brief because no attorney was able to undertake the representation upon such short notice. During the entire period in which he was to prepare his brief, he did not have the

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17/ (continued from page 32)

> appeals, that the provision is mandatory rather than directory, and that a mandatory time limit of this kind is constitutional, . . ."

The court offered no justifications for its assumptions because it had none; yet these assumptions remain in force in the Ninth Circuit and have never been challenged. The statute should be construed to require review by the district court within 30 days, to encourage expeditious consideration of the appeal of an incarcerated witness. In the instant case, the petitioner was free on bond.

record on appeal. As a result of the rush to judgment the California Attorneys for Criminal Justice were unable to file an amicus brief on his behalf. The petitioner was forced to prepare a petition for rehearing and in banc consideration without benefit of an opinion.

The Court of Appeals also attempted to foreclose any opportunity for further review or consideration of this significant case within the Ninth Circuit. Opinion, 2. Under Rule 35(b) of F.R.A.P., any judge in regular active service in the Circuit may request a vote of the entire circuit on the question of rehearing in banc. The rule does not provide that a three-judge panel may suspend operation of the normal procedure, nor could the court below cite any case in which two judges presumed to decide whether or not to grant a rehearing in banc for the entire circuit. This Court has held that wide latitude will be allowed the circuits in promulgating rules for deciding whether to sit in banc. Western Pac. R. Corp. v. Western Pac. R. Co., 345 U.S. 247, 259-260 (1953). Nevertheless, a procedure must be chosen which gives the litigant the opportunity to seek in banc review in significant cases; the procedure must be made known to those who wish to suggest in banc review; and the determination

> "of whether a cause should be heard en banc is an issue which should be heard separate and apart from the question of whether there should be a rehearing by the division."
> Western Pac. R. Corp. v. Western

Pac. R. Co., supra, 345 U.S. at 261-62.

The suspension by the court below of its normal rules for in banc reconsideration, decided simultaneously with the denial of review by the three-judge panel, deprived Mr. Michaelson of his right to seek in banc consideration in accordance with the rules of the Court of Appeals.

CONCLUSION

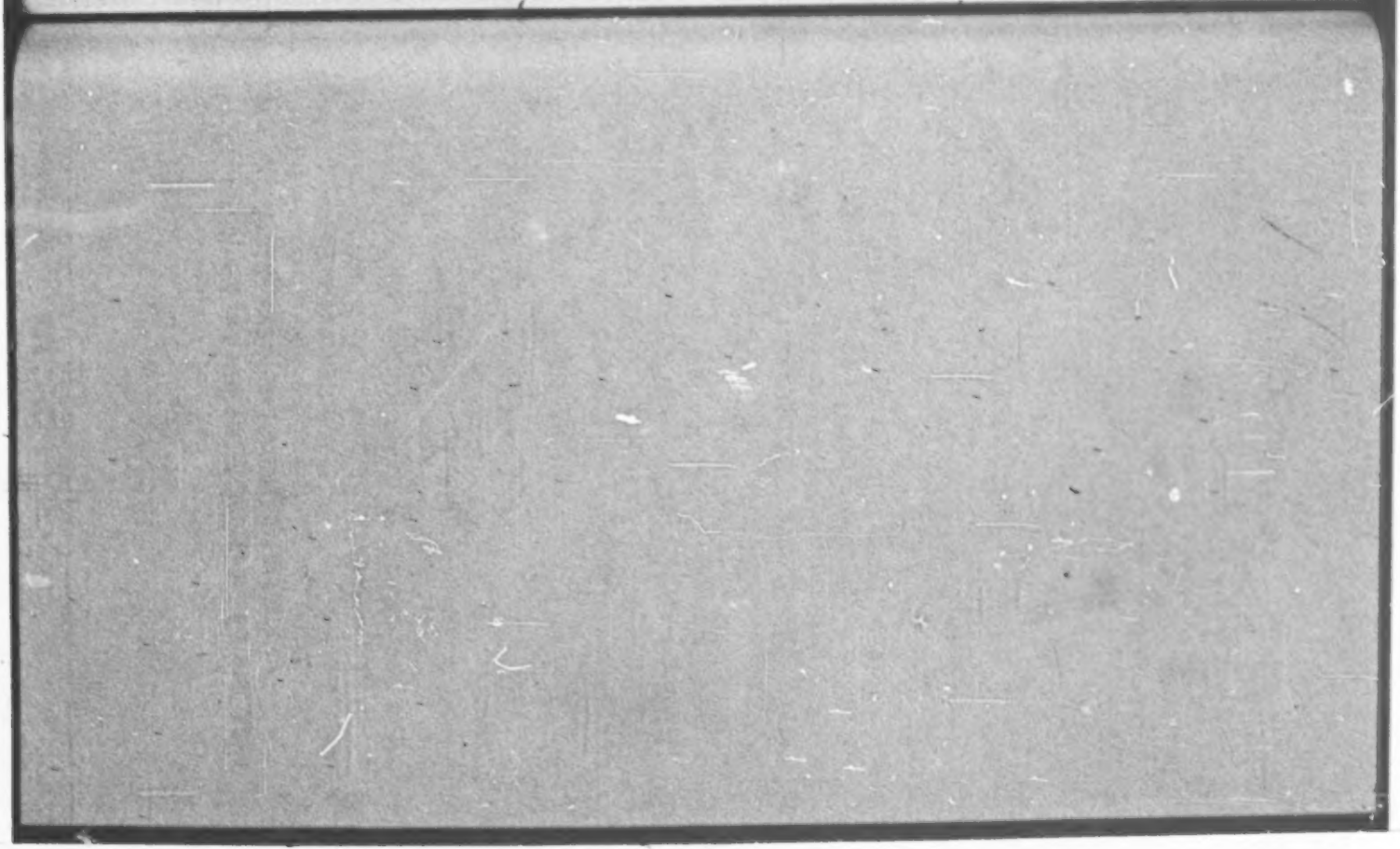
For the reasons stated, petitioner Alvin S. Michaelson, Esq., respectfully requests that the petition for writ of certiorari be granted and that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

Law Offices of
BARRY TARLOW

By Barry Tarlow

Attorneys for Petitioner



APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: GRAND JURY APPEARANCE OF ALVIN S. MICHAELSON, ESQUIRE.	No. 74-3409 OPINION

[January 22, 1975]

On Appeal from the United States District Court for the District of Nevada

Before: BARNES, MERRILL and DUNIWAY, Circuit Judges.

BARNES, Circuit Judge:

I. *Prior Proceedings*

This is an appeal from an order of the district court dated December 5, 1974, adjudging appellant, an attorney, in civil contempt and ordering him confined due to his refusal to answer questions before a grand jury after immunity had been granted to him and to his client under § 201(a) of the Organized Crime Control Act of 1970, 18 U.S.C. § 6002, et seq. Appellant is presently at liberty on bail.

The contempt order was entered pursuant to § 301(a) of the afore-mentioned Act, 28 U.S.C. § 1826.

In that 28 U.S.C. § 1826 requires that an appeal taken from such a contempt order be disposed of by this Court not later than 30 days from its filing (in the instant case, by Monday, January 6th, 1975 (January 4th being a Saturday), *see* Rule 6(a) Federal Rules of Civil Procedure), this panel on January 6th, 1975 filed an unpublished per curiam memorandum affirming the order of the district court. Judges Barnes and Duniway

joined in that memorandum and Judge Merrill reserved the right to file a dissent when the full opinion is published.

In addition to our affirmance of the district court's order, our memorandum of January 6th held:

> "Due to the time limitations imposed upon us by § 1826, this Court cannot consider any petitions for rehearing or consideration *en banc*, and no such petitions will be entertained. *See Charleston v. United States*, 444 F.2d 504 (9th Cir. 1971); *Bacon v. United States*, 446 F.2d 667 (9th Cir. 1971).
>
> "This case will be remanded forthwith to the district court to revoke bail and order Mr. Michaelson into confinement.
>
> "However, as counsel for appellant has suggested to us, that in the event of affirmance they may apply for a writ of certiorari, issuance of the mandate is stayed thirty days to enable appellant to apply for a writ of certiorari. If a timely application for such a writ is filed, the stay shall remain in effect until the application has been denied, or, if granted, until the cause has been determined by the Supreme Court. *Weg v. United States*, 450 F.2d 340 (9th Cir. 1971); *Bacon, supra*, at 669; *Charleston, supra*, at 506."

Our memorandum also bore a notation that an opinion setting forth in greater detail our reasons for affirmance would be issued in due course as has been the practice of this Circuit. *See Stewart v. United States*, 440 F.2d 954 (9th Cir. 1971), *aff'd sub nom. Kastigar v. United States*, 406 U.S. 441 (1972).

This now is that opinion.

II. *Statement of Facts*

Alvin S. Michaelson, Esq., an attorney at law, appeals from an order made by the Honorable Bruce R. Thompson, a district judge of the District of Nevada, dated December 5th, 1974, holding said Michaelson in civil contempt of court for his wilful disobedience of a previous order of the same court, dated October 17, 1974, which denied Michaelson's motion to quash his subpoena, and ordered said Michaelson to give testimony before a

United States Grand Jury "respecting unprivileged communications with his client, Brenda Maris Sibson."[1]

---

[1]In the United States District Court
for the District of Nevada

Misc. No. R-74-43 BRT

In Re:
Grand Jury Appearance of Alvin S. Michaelson, Esquire.

[Received and Filed Oct. 17, 1974]

ORDER

Alvin S. Michaelson, an attorney, has moved to quash a grand jury subpoena upon the ground that the anticipated questions will violate the attorney-client privilege.

"In the absence of unusual circumstances, the fact of a retainer, the identity of the client, the conditions of employment and the amount of the fee do not come within the privilege of the attorney-client relationship." *In re Semel,* 411 F. 2d 195 (3rd Cir. 1969) This is also true with respect to who paid the fee, if any. *United States v. Pape,* 144 F. 2d 778 (2nd Cir. 1944). The *Pape* case is instructive because of the dissent by Judge Learned Hand. Unlike *Pape,* Michaelson's affidavit in the instant case makes no claim that disclosure would violate a confidential communication from any client other than Brenda Sibson. In the affidavit, Michaelson alludes to conversations "between Brenda Marie Sibson, myself and/or her agents," but obviously, if the subject matter is not privileged as to Sibson, the client, it is not privileged in communications with the client's agents.

The allusion to possible jeopardy because of a false affidavit under the Criminal Justice Act is a red herring. *Sibson has been granted immunity from prosecution under 18 U.S.C. § 6002,* et seq, and has been interrogated with respect to the subject matter of Michaelson's proposed testimony. The Fifth Amendment privilege is personal and cannot be asserted by Michaelson for the protection of Sibson. Accordingly,

IT HEREBY IS ORDERED that the motion to quash the grand jury subpoena is hereby denied and Alvin S. Michaelson, Esq. is hereby ordered to appear before the United States Grand Jury at Reno, Nevada at 9:30

United States Grand Jury "respecting unprivileged communications with his client, Brenda Maris Sibson."[1]

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for the District of Nevada

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The allusion to possible jeopardy because of a false affidavit under the Criminal Justice Act is a red herring. *Sibson has been granted immunity from prosecution under 18 U.S.C. § 6002*, et seq, and has been interrogated with respect to the subject matter of Michaelson's proposed testimony. The Fifth Amendment privilege is personal and cannot be asserted by Michaelson for the protection of Sibson. Accordingly,

IT HEREBY IS ORDERED that the motion to quash the grand jury subpoena is hereby denied and Alvin S. Michaelson, Esq. is hereby ordered to appear before the United States Grand Jury at Reno, Nevada at 9:30

This was after Miss Sibson had been granted use immunity under 18 U.S.C. §6002, et seq., when she refused to answer certain questions before the same grand jury.

Michaelson appeared before the grand jury on December 4th, 1974, and refused to answer certain questions propounded by government counsel.

Later on that same day, Michaelson was taken before Judge Thompson who ordered that the secrecy of the grand jury proceedings be lifted, insofar as the testimony of Mr. Michaelson was concerned. Such testimony, read by the grand jury short-hand reporter, disclosed the following questions had been asked of Mr. Michaelson after he had been advised of the nature of the grand jury inquiry, and had known he had been ordered "to give testimony concerning certain fee arrangements between [himself] and Miss Brenda Sibson, and [was] to testify to those matters and any matters which [were] not subject to the attorney-client privilege." (R.T. Vol. IV, p. 11, line 14 to p. 12, line 7).

The questions which Mr. Michaelson refused to answer and which he was ordered to answer, were these (R.T. Vol. III, pp. 8-9):

1. Q. Did anyone refer Miss Sibson to you?

2. Q. Did you discuss a fee arrangement with Miss Sibson?

3. Q. Did any other individual besides Miss Sibson ever discuss with you a fee arrangement for your representation of Miss Sibson?

4. Q. What is your fee arrangement with Miss Sibson?

5. Q. How much money have you received from Miss Sibson?

6. Q. Have you received any money from any other person besides Miss Sibson to represent Miss Sibson?

7. Q. Have you received any funds from Miss Sibson?

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o'clock a.m. on October 24, 1974, then and there to give testimony respecting unprivileged communications with his client, Brenda Marie Sibson, as indicated in the foregoing discussion.

Dated: October 17, 1974.

/s/ Bruce R. Thompson
United States District Judge

8. Q. Have you made arrangements with Miss Sibson to pay your expenses?

9. Q. Have you made an arrangement with any other person besides Miss Sibson for the payment of your expenses to represent her?[2]

Judge Thompson rejected appellant's counsel's arguments that the information sought to be elicited by the questions was privileged under any of the grounds which appellant asserts, granted Michaelson use immunity, and again ordered him to answer the questions.

On December 5th, 1974, Mr. Michaelson again refused to answer the same questions; and Judge Thompson thereupon held Mr. Michaelson in contempt, and pursuant to the provisions of 28 U.S.C. § 1826 ordered him confined until he answered the questions, or until the term of the grand jury had expired. (C.T. 40-41). Mr. Michaelson filed this appeal, and was thereafter released on bail.

We first note that no objection was made to the form of the questions, or to their relevance to the grand jury investigation.

The sole question then before us is whether the information sought is privileged. Judge Thompson held it was not.

Mr. Michaelson urges that the information sought is privileged under one or more of the following reasons:

1. The First Amendment right of freedom of association.

2. The Fourth Amendment right of privacy.

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[2]The precise answer given to question 9 was this:

"A. I'm not going to answer that question on the grounds that I've indicated before. And for the record those grounds . . . [are] the First Amendment, the Fourth Amendment, the Fifth Amendment on behalf of my client, the Sixth Amendment, the Canons of Ethics of the American Bar Association, the attorney-client privilege, and the Canons of Ethics as indicated in California Business and Professions Code 606 E relating to my duties as an attorney as a member of the Bar of the State of California." (R.T., Vol. III. pp. 9-10).

3. The Fifth Amendment, raised on behalf of Mrs. Sibson.[3]

4. The Sixth Amendment right to effective counsel (alleging that forcing him to answer to the above questions would have a "chilling effect" on the attorney-client relationship).

5. The American Bar Association Code of Professional Responsibility.

6. The State of California Business and Professions Code, § 6068(e) and (h).

7. *People v. Canfield,* 12 Cal.3d 699 (1974).

8. The attorney-client privilege.

III. *Appellant's claims of privilege lack merit*

Several of Mr. Michaelson's positions are answered adversely to him by this Court's decision in *United States v. Cromer,* 483 F.2d 99 (9th Cir. 1973):

> "Cromer [an attorney] next claims that he need not respond to the summons due to the attorney-client privilege. The summons in question required Cromer to testify as to the amounts owed to him by Bell and Brooks [Cromer's clients] on certain dates, the identification of payments by case file name, the general purpose of the legal work and whether it was performed for Brooks or Bell.
>
> "[6, 7] The nature and existence of the privilege are determined by Nevada law. Baird v. Koerner, 279 F.2d 623,

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[3]Appellant does not assert the Fifth Amendment on his own behalf:

"Q. Then specifically you're invoking the First Amendment to the Constitution, the Fourth Amendment to the Constitution, your Fifth Amendment privilege——

A. As it relates to Miss Sibson.

Q. Her Fifth Amendment privilege?

A. Yes, on behalf of her I'm asserting it, that's correct.

Q. Are you invoking your own Fifth Amendment privilege?

A. I believe I cannot do that.

Q. I just asked you yes or no whether you were.

A. I can't answer it that way.

Q. A simple yes or no. Are you refusing to answer on the grounds it may tend to incriminate you?

A. Oh, no, absolutely not." (R.T. Vol. III, p. 7 lines 9-23).

[4]Footnote 4 is non-existent.

632 (9th Cir. 1960). The applicable Nevada statute[5] is of recent origin and we are left without guidance from Nevada courts. However, the term 'confidential' has been statutorily defined:

> 'A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.'

"Nev. Rev. Stat. § 49.055. We fail to see how the specific information requested can be considered a confidential communication. *See* Colton v. United States, 306 F.2d 633, 637-638 (2nd Cir. 1962), cert. denied, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499 (1963); C. McCormick, Evidence, § 90 (2d Ed. 1972).

"[8] Finally, Cromer attempts to raise Fourth and Fifth Amendment claims for his clients as well as himself. Even if he could raise the rights of Bell and Brooks, neither could prevent the sought-after testimony of Cromer. *See* Couch v. United States, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed. 2d 548 (1973); DeMasters v. Arend, 313 F.2d 79, 85 (9th Cir.), appeal dismissed per stipulation, 375 U.S. 936, 84 S.Ct. 341, 11 L.Ed.2d 269 (1963).

"[9] Equally unmeritorious in his claim that enforcement of this summons would violate his own Fourth and Fifth Amendment rights. Cromer does not demonstrate, as he must, how, as a result of revealing the answers to the specific questions that he has been ordered to answer, there will be a violation of his rights. His speculation and conjecture are

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[5](In *United States v. Cromer, supra.*)
"5 Nev.Rev.Stat. § 49.095 provides:

"A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:

"1. Between himself or his representative and his lawyer or his lawyer's representative.

"2. Between his lawyer and the lawyer's representative.

"3. Made for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest."

insufficient. 'It is well established that the privilege protects against real dangers, not remote and speculative possibilities.' Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 92 S.Ct. 1670, 1675, 32 L.Ed.2d 234 (1972); Hoffman v. United States, 341 U.S. 479, 486-87, 71 S.Ct. 814 95 L.Ed. 1118 (1951)." (Id. at 101-102)

We observe that in *Cromer*, this Court, relying on *Colton v. United States*, 306 F.2d 633, 638 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963) (as well as McCormick on Evidence, 90 (2d Ed. 1972)), summarily disposed of one primary issue raised in the instant case in stating it: "failed to see how the specific information requested can be considered a confidential communication," as that language is used in the Nevada law. *Cromer* is the law of this Circuit.

In Colton, the Second Circuit said that certain legal advice given by attorneys is "*prima facie* subject to the attorney-client privilege," but

"... the authorities are clear that the [attorney-client] privilege extends essentially only to the substance of matters communicated to an attorney in professional confidence. Thus the identity of a client, or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose, even though the fact of having retained counsel may be used as evidence against the client. United States v. Pape, 144 F.2d 778 (2nd Cir.), cert. denied, 323 U.S. 752, 65 S.Ct. 86, 89 L.Ed. 602 (1944); Behrens v. Hironimus, 170 F.2d 627 (4th Cir. 1958); Goddard v. United States, 131 F.2d 220 (5 Cir. 1942); People ex rel. Vogelstein v. Warden, 150 Misc. 714, 270 N.Y.S. 362 (Sup.Ct. 1934), aff'd mem. 242 App.Div. 611, 271 N.Y.S. 1059 (1st Dept. 1934); 8 Wigmore, Evidence § 2312 (McNaughton rev. 1961); McCormick, Evidence § 94 (1954). To be sure, there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communication, as where the substance of a disclosure has already been revealed but not its source. See, e.g., In re Kaplan, 8 N.Y. 2d 214, 203 N.Y.S.2d 836, 168 N.E.2d 660 (1960); Baird v. Koerner, 279 F.2d 623 (9 Cir. 1960).

"We find, however, no such special circumstances in the case at bar. Nor was the permissible inquiry in this regard ended when Colton stated that the Matters were his clients and had been for some time. The principle that permits inquiry into the existence of a professional relationship obviously also permits questioning as to the years during which the relationship has continued. Thus, under the accepted doctrine, there was no basis for Colton's refusal to answer Questions 52 and 54.

"[5] For similar reasons there was no basis for Colton's refusal to state, in answer to Question 55, whether he had received any remuneration from the Matters for legal services rendered during the years 1954 through 1957."

The cases relied upon by Judge Thompson are mentioned in his order. They all establish that "In the absence of unusual circumstances, the fact of a retainer, the identity of the client, the conditions of employment and the amount of the fee and who paid it do not come within the privilege of attorney-client relationship." *In re Semel*, 411 F.2d 195 at 197 (3rd Cir. 1969), *cert. denied* 396 U.S. 905 (1969); *United States v. Pape*, 144 F.2d 778, 782-783 (2nd Cir. 1944); *Colton v. United States*, 306 F.2d 633 (2nd Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *United States v. Cromer*, 483 F.2d 99 (9th Cir. 1973); *Wirtz v. Fowler*, 372 F.2d 315, 332-3 (5th Cir. 1966); *Mauch v. CIR*, 113 F.2d 555 (3rd Cir. 1940); In re *Wasserman*, 198 F.Supp. 564 (D.D.C. 1961).

Thus it has generally been held that information concerning the fee arrangement between an attorney and his client, or the existence of the attorney-client relationship is not privileged or protected by the attorney-client privilege. An exception is made for cases where the existence of the attorney-client relationship might be incriminating to a client (as in *Baird v. Koerner, supra*, or, as where an attorney returns a murder weapon to the police). This is not such a case. We also note that even this exception would not apply where the proper immunities are granted.

There are strong policy reasons why the existence of an attorney-client relationship, including the fee arrangement, should not be privileged absent incriminating circumstances such as outlined

above. The courts have inherent power to regulate the bar. The courts have the right to inquire into fee arrangements both to protect the client from excessive fees and to assist an attorney in collection of his fee, but more importantly, the court may inquire into fee arrangements to protect against suspected conflicts of interest. When an attorney is paid by someone other than his client to represent that client there is a real and present danger that the attorney may in actuality be representing not the interests of his client, but those of his compensator. Not only does the client have a right to know who is paying his attorney, but the court retains the right to satisfy itself that no conflict exists and that the attorney is fulfilling his duty of loyalty to his client.

For two reasons we find no merit in appellant's assertion of a Fifth Amendment defense on behalf of his client.

First, the Fifth Amendment privilege is personal. Appellant's arguments and the facts of this case do not satisfy either of the two requirements for the assertion of a Fourth or Fifth Amendment privilege which were identified by the Supreme Court in *Couch v. United States*, 409 U.S. 322 (1973). The fee information requested in this instance is not a privileged professional communication between lawyer and client in which the client has a legitimate expectation of privacy. Furthermore, the compulsion of this contempt order is directed not at compelling Miss Sibson to testify, but rather against Mr. Michaelson. As the court in *Couch* said:

> "The criterion for Fifth Amendment immunity remains not the ownership of property but the '"physical or moral compulsion" exerted.' *Perlman*, 247 U.S., at 15. We hold today that no Fourth or Fifth Amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused.
>
> • • •
>
> "It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him. As Mr. Justice Holmes put it: 'A party is privileged from producing the evidence but not from its production.' *Johnson v.*

United States, 228 U.S. 457, 458 (1913). The Constitution explicitly prohibits compelling an accused to bear witness 'against himself'; it necessarily does not proscribe incriminating statements elicited from another. Compulsion upon the person asserting it is an important element of the privilege, and 'prohibition of compelling a man . . . to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from *him*,' *Holt v. United States*, 218 U.S. 245, 252-253 (1910) (emphasis added). It is extortion of information from the accused himself that offends our sense of justice.

"In the case before us the ingredient of personal compulsion against an accused is lacking. The summons and the order of the District Court enforcing it are directed against the accountant. He, not the taxpayer, is the only one compelled to do anything. And the accountant makes no claim that he may tend to be incriminated by the production. Inquisitorial pressure or coercion against a potentially accused person, compelling her, against her will, to utter self-condemning words or produce incriminating documents is absent. In the present case, no 'shadow of testimonial compulsion upon or enforced communication by the accused' is involved. *Schmerber v. California*, 384 U.S. 757, 765 (1966)" (Id. at 336, 328-29).

Secondly, no Fifth Amendment privilege can be here asserted since both Mr. Michaelson and Miss Sibson were granted use immunity prior to Michaelson being instructed to answer the questions. Transactional immunity would afford a broader protection than the Fifth Amendment privilege, but

"immunity from use and derivative use is co-extensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader." Kastigar, et al. v. United States, 406 U.S. 441 at 453 (1972).

In arguing that he may assert a Fifth Amendment privilege on behalf of his client, appellant primarily relies upon *United*

States v. Kasmir, 499 F.2d 444 (5th Cir. 1974) and *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963). *Judson* is pre-*Couch* and pre-*Kastigar*, and prior to the use immunity statute enactment in 1970; and in neither *Kasmir* nor *Judson* had immunity been granted.

Judson, by its own language, is not here controlling. True, Mr. Judson, an attorney, claimed to raise the Fifth Amendment privilege on behalf of his clients, the Stachers.

It was undisputed that the negotiable instruments in commerce (checks and bank statements) delivered to the attorney Judson, "were never confidential from the time of their creation" (i.e., the attorney-client privilege did not apply to them). The Fifth Amendment was not invoked by the Stachers, but the items were non-compellable, if an attempt were made to have the Stachers produce them and they asserted their Fifth Amendment privilege. At issue in the *Judson* case is the effective exercise of the [Fifth Amendment] privilege "by one who is clearly entitled to its protection," meaning the taxpayers, Joseph and Miriam Stacher (*id.* at 463).

But here, neither Michaelson nor Miss Sibson is entitled to such Fifth Amendment privilege because of the use immunity previously granted each of them.

The court in *Judson* draws the distinction between cases in which the client *could* assert a Fifth Amendment claim on his own behalf, and those cases in which he was barred from so doing by waiver, or some other disability, whereby "the client himself could not have raised the privilege."

Even assuming that *Judson* retains any viability since the Supreme Court's decision in *Couch*, appellant does not come within the confines of the *Judson* rule. In the instant case, Miss Sibson *cannot* assert a Fifth Amendment claim on her own behalf because she has been granted use immunity. Applying the *Judson* rule then, Michaelson cannot assert the Fifth Amendment on her behalf.

The second case heavily relied upon by appellant is *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974). In *Kasmir*, the court observed:

"Following *Couch*, it is clear that the taxpayer could assert no Fifth Amendment privilege in the records while they were held by his accountant. It is likewise clear from *Couch* that at the time the taxpayer obtained actual possession of the records, the day before the summons was served, he was in the position to assert his Fifth Amendment privilege, if the summons had then been served. Had he at that point followed Judge Gewin's analysis and placed the materials in a safe under his control, he could have successfully invoked the privilege by relying upon his constructive possession. *See* Schwimmer v. United States, 8th Cir. 1956, 232 F.2d 855; United States v. Guterma, 2nd Cir. 1959, 272 F.2d 344. Instead the taxpayer transfers the materials to his attorney for safekeeping and for the preparation of his defense.

"We are thus faced with this dilemma: If we hold that no Fifth Amendment privilege is now available, then the taxpayer's rights have been effectively decreased by his transfer. In a sense, the taxpayer is better off without an attorney to study the records than with him." (*Id.* at 451).

To solve the dilemma, the *Kasmir* majority chose to rely on deciding "whether the taxpayer has a sufficient legitimate expectation of privacy in the summoned records to warrant the label of constructive possession" (which had been denied in *Couch*, *supra*, at 334-338, to a taxpayer who left his records with an accountant). *Kasmir* rejects "the idea that a taxpayer's right to be free from self-incrimination can be *decreased* or defeated by the taxpayer's transfer of records to his attorney pursuant to the attorney-client relationship." (*Id.* at 452, emphasis in original); and holds that there was constructive possession in the taxpayer, and he could exercise his Fifth Amendment rights.

The above quoted language is followed by a reference to Note 5 in *Kasmir*. Note 5 (id. at 452) cites 8 Wigmore, *Evidence* (McNaughton rev. 1961) § 2308. (*But see* § 2312.) Therein, the following appears:

"It follows, then, that *when the client himself would be privileged* from production of the document . . . as exempt from self-incrimination, the attorney having possession of the document is not bound to produce. . . . On the other hand,

> if the *client would be compellable* to produce, . . . then the attorney is equally compellable." (Emphasis in original.)

Again, we point out—the *Kasmir* holding rests upon the client's having his Fifth Amendment privilege. In the instant case, Miss Sibson did *not* have such a privilege because of the immunity granted her.

We also note that the Court in *Kasmir* cites for support the language in *Judson* which we have previously quoted: that the attorney's ability to assert the Fifth Amendment on behalf of his client depends upon the client's ability to assert the privilege on his own behalf. Hence for the same reason stated by this Court in distinguishing *Judson, Kasmir* is also distinguishable.

The court in *Kasmir* goes on to rule that while "[t]he attorney-client *relationship*, as distinguished from the attorney-client privilege," cannot be asserted

> "as a basis for denying enforcement of the summons . . . the client . . . may still have a legitimate expectation of privacy . . . because of the attorney-client relationship, an expectation of privacy which helps to give substance to a Fifth Amendment privilege contention." (*Kasmir* at 453).

As to the attorney-client *relationship* claim, we find *Kasmir* distinguishable from the instant case. As *Kastigar* instructs, a grant of use immunity precludes any Fifth Amendment claim of privilege. In the absence of immunity, as was the case in *Kastigar*, the attorney-client relationship may well give rise to an expectation of privacy, but if use immunity can constitutionally be used to invade a client's privacy, to the extent of forcing him to testify to acts which may amount to legal and moral crimes, it certainly can be used to force disclosure of information concerning a client's fee arrangement with his attorney.

In striking the delicate balance between the information needs of the courts in administering justice and a party or witness's right to privacy, it is sufficient that testimony elicited from a person not be used against him without a valid waiver of his Fifth Amendment privilege or the granting of immunity. But a party's or witness's residual rights of privacy; that is, the discomfort *any*

witness has in testifying against his wishes about matters within his knowledge, cannot outweigh the court's interest in getting the facts necessary to make a reasoned and informed decision. Were this not so, no immunity, indeed no subpoena, could stand—since both invade upon this residual right of privacy.

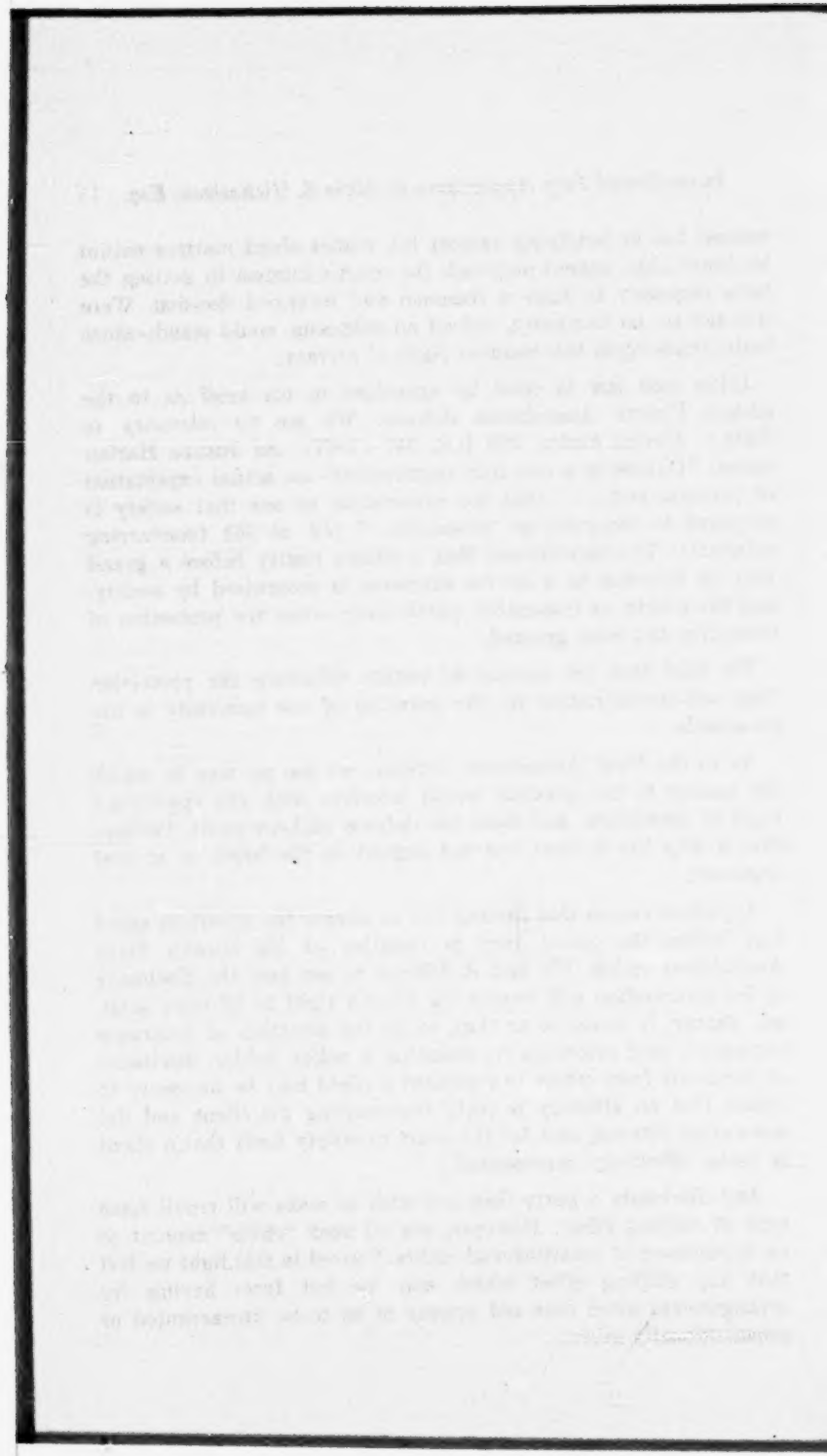
Little case law is cited by appellant in his brief as to the alleged Fourth Amendment defense. We see no relevancy to *Katz v. United States*, 389 U.S. 347 (1967). As Justice Harlan states: "[t]here is a two fold requirement—an actual expectation of privacy, and . . . that the expectation be one that society is prepared to recognize as 'reasonable.'" (*Id.* at 361 (concurring opinion)). The requirement that a citizen testify before a grand jury in response to a lawful subpoena is recognized by society, and the courts, as reasonable, particularly when the protection of immunity has been granted.

We hold that the refusal to testify following the protection from self-incrimination by the granting of use immunity is unreasonable.

As to the First Amendment defense, we see no way in which the answer to the question would interfere with the appellant's right of association, and deem the defense without merit. Perhaps this is why the defense was not argued in the brief, or at oral argument.

Appellant argues that forcing him to answer the questions asked him before the grand jury is violative of his client's Sixth Amendment rights. We find it difficult to see how the disclosure of fee information will impair his client's right to effective counsel. Rather, it seems to us that, as in the situation of insurance company's paid attorneys representing a policy holder, disclosure of payments from others to represent a client may be necessary to insure that an attorney is truly representing his client and not some other interest, and for the court to satisfy itself that a client is being effectively represented.

Any disclosure a party does not wish to make will entail some type of chilling effect. However, not all such "chills" amount to an impairment of constitutional rights. Viewed in this light we feel that any chilling effect which may be felt from having fee arrangements aired does not appear to us to be unwarranted or constitutionally infirm.



Counsel for appellant suggests "horribles" that will occur if this contempt order is affirmed—that this matter "is only the latest example of what is contended to be the widespread abuse of the intended function of the grand jury process by officials of the United States Government." (Op. Br. at 12).

The best answer to this is the last paragraph of the Cromer decision, quoted above. To paraphrase it:

> "Michaelson does not demonstrate, as he must, how, as a result of revealing the answers to the specific questions that he has been ordered to answer, there will be a violation of his rights. His speculation and conjecture are insufficient. It is well established that the privilege protects against real danger, not remote or speculative possibilities."

We finally turn to appellant's claim that the Code of Ethics of the American Bar Association (herein ABA), and the California Business and Professions Code 607 E (sic., 6068, see Note 1) entitle him to refuse to answer. In his brief, he also relies upon Nevada Statute § 49.095; Supreme Court Rules, State of Nevada, § 1, Rule 179, and the ABA Code of Professional Responsibility Dr. 4-101-(A), (B)(1), and the case of *People v. Canfield, supra.*

While we recognize the power to compel testimony is not absolute, we seriously doubt if any local, state, regional, or national bar association would seriously intend, or contend, that any rules or recommendations or ethical advice they encourage their members to follow, can by such mere approval, create a legal right or privilege in any attorney to disobey the laws of the United States, or the interpretation thereof by the United States Supreme Court. Can it be seriously suggested that if a lawyer is told by his client, "This information is a secret between us," the client can by such an expression foil and render totally void and nugatory the many immunity acts passed by the Congress of the United States over the past century? The treatment by the Supreme Court in *Kastigar, supra,* at 443, *et seq.,* of the history of the right to compel testimony, the immunity statutes, and the Fifth Amendment privilege would certainly indicate the contrary:

> "The commentators, and this Court on several occasions, have characterized immunity statutes as essential to the effective enforcement of various criminal statutes. As Mr. Justice

> Frankfurter observed, speaking for the Court in Ullman v. United States, 350 U.S. 422 (1956), such statutes have 'become part of our constitutional fabric.' Id at 438." *Kastigar, supra,* at 447.

We applaud the ABA's Code of Professional Responsibility, Ethical Consideration 4-4, which provides

> "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidence and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."

We do not interpret this, or any other of the Codes referred to by appellant as authorizing any lawyer to disobey the laws passed by the Congress, as interpreted by the Supreme Court. We concede this argument was urged in *Kasmir,* and referred to in the majority opinion. We prefer the reasoning of the dissent. Until the Supreme Court rules to the contrary, we do not propose to follow the *Kasmir* ruling, which of course, is not binding in this circuit.

In the case of *People v. Canfield, supra,* the California Supreme Court held that a financial statement filed by a defendant with his public defender was protected by the lawyer-client privilege, and should not have been entered in evidence, but that such error was harmless, and the conviction affirmed.

Appellant's reliance on *Canfield* is inapposite. First, we note that it is the Nevada law relative to the attorney-client privilege which is at issue in this case, not California's. Under Nevada law, as interpreted by this Court in *Cromer, supra,* information concerning fee arrangements between an attorney and his client are not privileged (except in exceptional cases not here relevant). Second, in *Canfield* Mr. Justice McComb specifically declined to consider whether "forcing disclosure of the statement at his trial was a violation of his rights under the Fifth and Sixth Amendments to the United States Constitution, as well as Article I, Section 13 of the California Constitution, and also denied him equal protection of the laws." (*Id.* at 707).

We find no merit in appellant's reliance on these matters urged as recited above.

We wish to make very clear that in holding that testimony elicited from Mr. Michaelson under a grant of immunity is not otherwise privileged, we do not reach the question of what the scope of the immunity granted to him and Miss Sibson is. We hold that Michaelson is not privileged to withhold his information from the Grand Jury. We do not reach the question of whether testimony elicited from Mr. Michaelson may be used in a subsequent prosecution against Miss Sibson; and vice versa, should Mr. Michaelson be prosecuted, we will not anticipate this issue since the situation has as yet not arisen. Indeed, it would be constitutionally improper for us to reach this question since the issue lacks the necessary facts to make it concrete. This issue is not only unripe, the case is non-existent. This Court does not intend to and cannot, issue an advisory opinion on a hypothetical fact situation.

Finding no merit in any of appellant's allegations of privilege, we

Affirm.

MERRILL, Circuit Judge, dissenting:

I can conceive of no purpose for seeking the information covered by the questions in issue except to show a connection between Miss Sibson and some unknown person thought to have referred her to Michaelson and to have undertaken to pay his fee. If such connection be relevant, one may expect that some inference of guilt of Miss Sibson may rationally be drawn from the fact of the connection. Asking these questions of Michaelson can serve alternative purposes: (1) if the answers correspond to those already given by Miss Sibson, the United States may have escaped Miss Sibson's use immunity by obtaining the information from another source; (2) if the answers differ from those given by Miss Sibson, they may serve to expose her to a charge of perjury. I dislike this reliance upon the attorney-client relationship to accomplish incrimination of the client.

The majority may be correct in concluding that the attorney-client *privilege* does not attach to the information sought since

that information was not the subject of a confidential communication strictly defined; and that under *Couch v. United States*, 409 U.S. 322 (1973), Miss Sibson's fifth amendment rights cannot be asserted by Michaelson. I am not prepared to accept these propositions without further study, which time simply does not permit. Assuming the majority to be correct, however, to me that is not the end of the matter.

Where the circumstances suggest that the client may be incriminated by the information sought from the attorney, and where that information came to the attorney's knowledge by virtue of the attorney-client relationship, the appropriate test in my judgment should not be limited to technicalities of confidentiality or fifth amendment privilege. Voluntary revelation of such information by the attorney surely would be regarded as a breach of professional ethics. I cannot accept the view that the courts are duty bound in every case to coerce such breach through power of the civil contempt sanction. This would be to require the courts to act in derogation of a relationship to which they traditionally accord high respect.

I cannot, then, agree that the only limits upon what a court may require an attorney to divulge respecting his client are those prescribed by privilege and the Fifth Amendment. Where ethical considerations intervene, surrender of the information to the Government should no longer be regarded as a matter of unquestionable governmental right. Public need to obtain the information from this source should not be blindly accepted without giving consideration to the interests represented by the attorney-client relationship, and a court order should be the result of an exercise of judgment seeking to reconcile the competing interests. Absent some showing of weighty governmental need of this information from this source, in my judgment the order should not have issued.

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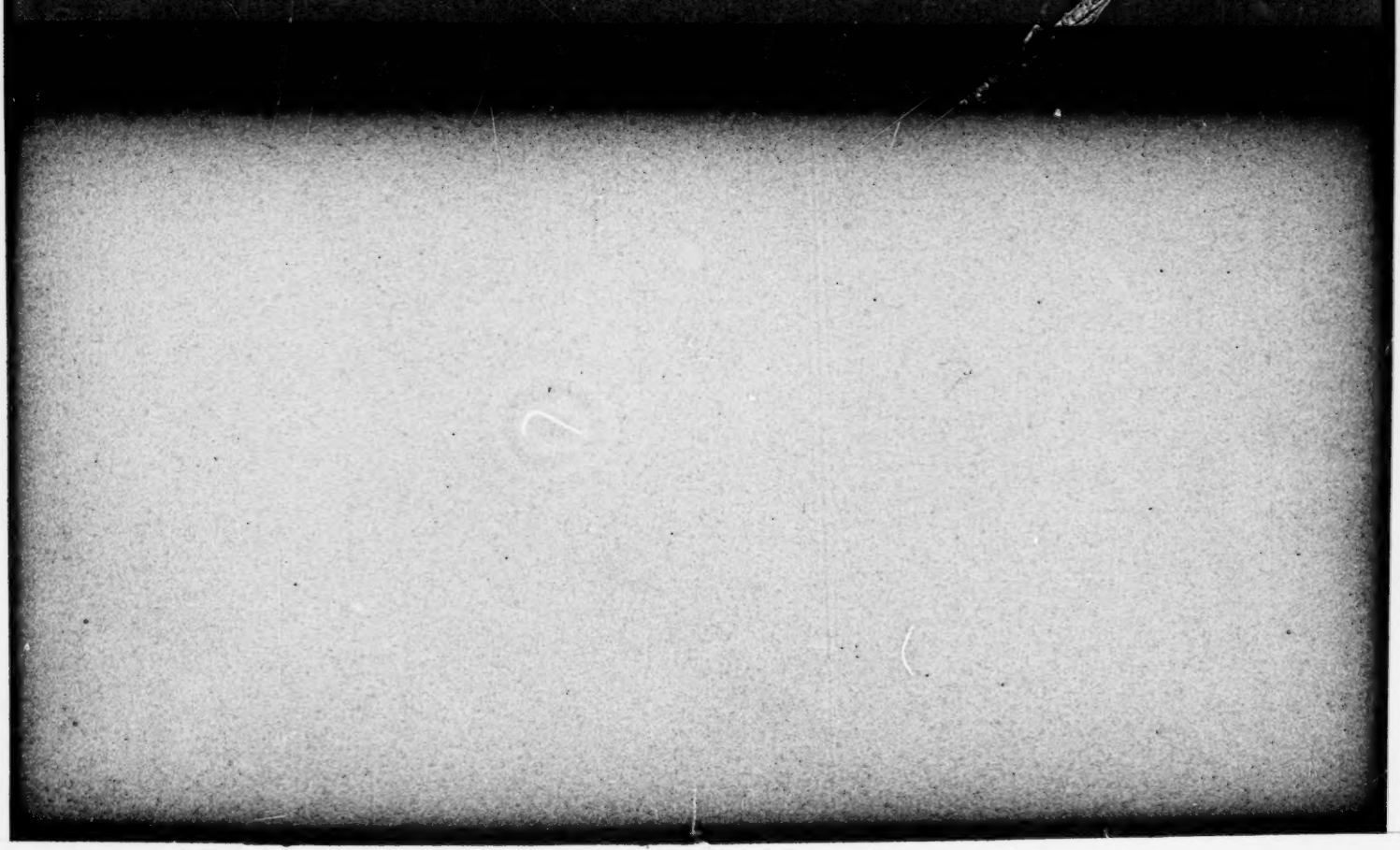

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. _____

IN RE GRAND JURY APPEARANCE
OF ALVIN S. MICHAELSON, ESQ.

AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Table of Authorities	ii-v
Interests of the Amici Curiae	1
Question Presented	1
Statement of the Case	2
Reasons for Granting the Writ	3
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Application of House, 144 F. Supp. 95 (N. D. Cal. 1956) 11

Baird v. Koerner, 279 F. 2d 629 (9th Cir. 1960) 5, 14, 21

Brody v. United States, 243 F. 2d 378 (1st Cir.), cert. denied 354 U. S. 923 (1957) 11

Chirac v. Reinicker, 24 U. S. (11 Wheat.) 280 (1826) 23

Colton v. United States, 306 F. 2d 633 (2d Cir. 1962) 21

Coplon v. United States, 191 F. 2d 749 (D. C. Cir. 1951), cert. denied 342 U. S. 926 (1952) 14

Heathman v. United States District Court, 503 F. 2d 1032 (9th Cir. 1974) . 21

Hoffman v. United States, 341 U. S. 479 (1951) 19

In re Butts, 493 F. 2d 842 (5th Cir. 1974) 25

In re Marshall, 423 F. 2d 1130 (5th Cir. 1970) 10

In re Terkeltoub, 256 F. Supp. 683 (S. D. N. Y. 1966) 19

In re Watts & Sachs, 190 U. S. 1 (1903) . 12

Kastigar v. United States, 406 U.S. 441 (1972) 15, 16

Maness v. Meyers, ___U.S.___ (1975) 11, 20

McCarthy v. Arndstein, 266 U.S. 34 (1924) 15, 16

Parmelee Transportation Co. v. Keeshin, 294 F.2d 310 (7th Cir. 1961) 10

People v. Canfield, 12 C.3d 699 (1974) 8

People v. Kor, 129 Cal.App.2d 436, 277 P.2d 94 (1954) 7

Powell v. Alabama, 287 U.S. 45 (1932) 5

Schwimmer v. United States, 232 F.2d 855 (8th Cir. 1956) 15

Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965) 14

United States v. Couch, 409 U.S. 322 (1973) 15

United States v. Crockett, 506 F.2d 759 (5th Cir. 1975) 5

United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972) 19

United States v. Dionisio, 410 U.S. 1 (1973) 24

United States v. Fisher, 500 F.2d 683 (3rd Cir. 1974) 23

United States v. Judson, 322 F.2d 460 (9th Cir. 1963) 4

United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974) 5,6,17,19,23

United States Securities & Exchange Commission, 226 F.2d 501 (6th Cir. 1955) 19

United States v. Star, 420 F.2d 1214 (9th Cir. 1972) 18

United States v. White, 322 U.S. 694 (1944) 18

United States and Joseph H. Romine, Special Agent Internal Revenue Service v. Frank E. Haddad, Civil No. 74-377 L[A] (W.D.Kty. 1974).. 24

Statutes

18 U.S.C. § 6002 2

28 U.S.C. § 1826 3

California Evidence Code § 952 8

California Business and Professions Code § 6068(e) 6

California Business and Professions Code § 103 6

California Code and Civil Procedure § 1881 6

Miscellaneous

American Bar Association Cannon 37 7

American Bar Association Disciplinary Rule 4-101(B) 7

American Bar Association Disciplinary Rule 5-102 5

American Bar Association Ethical Consideration E-C 4-4 7

American Bar Association Opinion No. 287 (1953) 7

Note, 26 Vanderbilt L. Rev. 1078 (1973)..... 13

Note, 5 Loyola Univ. L. Jour. 490 (1974) ... 17

Proposed Federal Rules of Evidence § 501 .. 22

Report of the Committee on the Judiciary of October 18, 1974, 93d Cong., 2d Sess., Report No. 93-1277 22

INTERESTS OF THE AMICI CURIAE

A number of attorney associations have joined together to file this amicus curiae brief in support of the petition for a writ of certiorari to this Court filed by the petitioner, Alvin S. Michaelson, Esquire, on 11 February 1975. Never before in our knowledge has there been a case such as this in which an attorney has been subpoenaed to testify before the grand jury in order to provide information for a prosecution based upon communications with his client. Each of the following organizations find the majority opinion of the Ninth Circuit Court of Appeals in the case below to be a disturbing erosion of the attorney-client relationship and thus join in this brief: the American Civil Liberties Union of Northern California and Southern California; the California Attorneys for Criminal Justice; the Coalition to End Grand Jury Abuse; the California Public Defenders Association; the California Trial Lawyers Association; Federal Defenders of San Diego, Incorporated; the National Association of Criminal Defense Lawyers; the National Lawyers Guild; the National Legal Aid and Defender Association; the San Diego County Bar Association; and the San Diego Criminal Defense Lawyers Club.

QUESTION PRESENTED

1. Whether the Fifth and Sixth Amendment guarantees against self-incrimination and the effective assistance of counsel, as well as the attorney-client privilege and relationship, preclude grand jury questioning of a client's attorney concerning attorney-client communications for the purpose of gathering evidence to prosecute the client?

STATEMENT OF THE CASE [1]

Petitioner Alvin S. Michaelson, Esq., an attorney representing Brenda Sibson, was held in contempt on 5 December 1974 by the Honorable Bruce R. Thompson, a district judge of the District of Nevada based upon his refusal to answer questions before the grand jury.

The facts leading to this alleged contempt are quite simple. Mr. Michaelson was retained to represent Brenda Sibson. Ms. Sibson had been subpoenaed to testify before the grand jury, refused to answer questions on Fifth Amendment grounds, was granted use immunity under 18 U.S.C. § 6002 and thereafter called before the grand jury. Subsequently, her attorney, petitioner, was subpoenaed before the same grand jury and was told by James Duff, Esq., of the Department of Justice, that his answers would be used, if possible, to incriminate Ms. Sibson on the substantive offenses underlying the grand jury investigation or to demonstrate that Ms. Sibson had perjured herself before the grand jury.[2] Mr. Michaelson refused to so testify[3] based upon, inter alia, his client's Fourth, Fifth and Sixth Amendment rights, the attorney-client privilege and his ethical responsibilities as counselor to Ms. Sibson and attorney licensed to practice in

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1 The amici adopt the jurisdictional statement and argument of petitioner. Letters of consent for the filing of this brief are on file with the clerk of the Court.

2 Petitioner's petition at 9.

3 The questions which petitioner declined to

the State of California. The district court rejected petitioner's arguments, held Mr. Michaelson in contempt under 28 U.S.C. § 1826, and ordered him confined until he answered the questions, or until the grand jury had expired. The Ninth Circuit Court of Appeals, by a two-to-one vote, affirmed the contempt holding and Mr. Michaelson petitioned this Court on 11 February 1975 for a writ of certiorari to review that decision.

REASONS FOR GRANTING THE WRIT

1. The Fifth and Sixth Amendment guarantees against self-incrimination and the effective assistance of counsel, as well as the attorney-client privilege and relationship preclude grand jury questioning of a client's attorney concerning attorney-client communications for the purpose of gathering evidence to prosecute the client.

The issue presented in the petition for a writ of certiorari by petitioner Alvin S. Michaelson, Esquire is fundamental to the future of the relationship between an attorney and client. Involved in this question are the Fourth, Fifth and Sixth Amendments, the attorney-client

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3 cont'd. respond to may be found at pages 4-5 of the slip opinion of the Ninth Circuit majority decision. They concerned the fee arrangement between petitioner and his client as well as questions concerning who referred Ms. Sibson to petitioner.

privilege and the effect of rules regulating attorney conduct. Petitioner considers these protections individually in arguing the case against compelling an attorney to give testimony concerning client communications for use against his client. The amici reach the same result by an alternate route; that is, that the various constitutional protections, the attorney-client privilege, and rules guiding attorney professional practice combine to protect the attorney-client relationship from the threat of invasion posed by grand jury inquisition. It is this relationship and the reasonable privacy expectations in entering it, which shield both attorney and client from punishment for refusing to discuss the communications which created it.

In United States v. Judson, 322 F.2d 460, 467 (9th Cir. 1963), the Ninth Circuit recognized that: "No other third party, nor agent, nor representative, stands in such a unique relationship between the accused and the judicial process as does his attorney. . . . the attorney and his client are so identical with respect to the function of evidence and to the proceedings which call for his protection that any distinction is sophistry." (Emphasis added).

As Ms. Sibson's attorney, petitioner was subpoenaed to testify before the grand jury and answer questions which Ms. Sibson had been asked. With admirable candor, the government confessed below that the purpose of the inquiry of Ms. Sibson's attorney was to use his testimony in a possible perjury prosecution or as part of a prosecution for the substantive crimes under investigation. Irrespective of the violation of Ms. Sibson's Fifth Amendment rights or the attorney-client privilege, this use of the grand jury process to extract incriminating information from one's own counsel strikes at the heart of

the attorney-client relationship by denying the client the effective representation of counsel of her choice under Powell v. Alabama, 287 U.S. 45 (1932), and perhaps any representation at all. [American Bar Association Disciplinary Rule 5-102 (lawyer must withdraw from representation when it is apparent he will become a witness in his client's case); see also United States v. Crockett, 506 F.2d 759 (5th Cir. 1975) (lawyer must cease defense participation as soon as he learns he is to become a prosecution witness)].

There is an unquestioned overlap in this area between the protections guaranteed by the Fifth Amendment privilege, the attorney-client privilege and the Sixth Amendment protection of the attorney-client relationship; clearly, the most compelling reason for disallowing grand jury interrogation of a defense attorney concerning the nature of his relationship with his client is grounded in the unique quality of the attorney-client relationship. A client has a legitimate and reasonable expectation in seeking counsel that she will be able "to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice in order that the former [client] may have adequate advice in a proper defense. This assistance can be safely and readily made available only when the client is free from the consequences of apprehension of disclosure. . . "Baird v. Koerner, 279 F.2d 629 (9th Cir. 1960) (attorney-client privilege prevents attorney from divulging identity of client who had anonymously turned in "conscience" money to the attorney for transfer to the Internal Revenue Service).

The Ninth Circuit majority decision below only pays lip service to the legitimate expectation of privacy which a client has in making communications to counsel, citing United States

v. Kasmir, 499 F.2d 444, 453 (5th Cir. 1974). This legitimate client expectation of privacy concerning all communications with her attorney is buttressed by the strict ethical rules guiding professional conduct of the practicing attorney. For example, Mr. Michaelson, licensed to practice in the State of California, has the following legal restrictions which preclude without exception his divulging the secrets and confidences of his client:

> (1) California Business and Professions Code § 6068(e): "It is the duty of an attorney: . . . (b) to maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." (Emphasis added)
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> (2) California Code and Civil Procedure § 1881: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: . . . 2. An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity." (Emphasis added)
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> (3) California Business and Professions Code § 103: ". . . any violation of the oath taken by him, or his duties as such attorney, constitute causes for disbarrment or suspension."

(4) American Bar Association Ethical Consideration E-C 4-4: "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; . . . a lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client."

(5) American Bar Association Disciplinary Rule 4-101 (B): "Except as permitted. . . . , a lawyer shall not knowingly: (1) Reveal a confidence or secret of his client."

(6) American Bar Association Cannon 37: "Confidences of a Client: It is the duty of a lawyer to preserve his client's confidences."

(7) American Bar Association Opinion No. 287 (1953): "A lawyer's duty to preserve confidences of his clients transcends even his duty to disclose perjury resulting in a judgment otherwise unobtainable."

(8) An attorney should elect to go to jail and take his chances on release by a higher court rather than divulge communications of his client. People v. Kor, 129 Cal. App. 2d 436, 447, 277 P. 2d 94, 101 (1954) (on court order, an attorney for a

defendant in a criminal case testified as to conversations with his client after the claim of privilege had been overruled; the defendant's conviction was reversed for the erroneous denial of the privilege claim, the appeals court stating that the attorney "should have chosen to have gone to jail and take his chances of release by a higher court. . . . [I]t is, . . . a suggestion to any and all attorneys who may have the misfortune to be confronted by the same or a similar problem."

(9) "The lawyer client privilege is, indeed, so extensive that where a person seeks the assistance of an attorney with a view to employing him professionally, any information acquired by the attorney is privileged whether or not actual employment results. [citation omitted]" People v. Canfield, 12 C. 3d 699, 705 (1974) (statements made by client to public defender concerning financial status were privileged). See also California Evidence Code § 952.

The majority opinion below "failed to see how the specific information requested can be considered a confidential communication" under Nevada law to be protected by the attorney-client privilege, (slip opinion at 8) at least absent "incriminating circumstances." (Id. at 9) Totally ignored is the bold fact that the requisite "incriminating circumstances" were provided by the concession that the responses to the grand jury questions by petitioner concerning fee arrangements and referral were to be used, if at all possible, by the government in a prosecution of Ms. Sibson.

Instead of a discussion of the peculiar facts before it, the majority opinion outlines general

policy reasons why court inquiry into fee arrangements and referrals is necessary to avoid excessive fees and conflicts of interest. (Id. at 10) As a statement of policy, [4] the language of the opinion is proper. However, it has nothing at all to do with the instant case. The district court had no part in formulating the questions awaiting petitioner. No claim had been made concerning conflicts of interest or fee gouging. The facts of this case solely demonstrate that the government attorney desired to use petitioner's responses to grand jury questions as evidence in a subsequent prosecution of his client. There can be no stronger case for a defense attorney's declination to testify than when the grand jury process is being used by a prosecutor to gain pre-

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[4] The grand jury is hardly the appropriate place for preliminary inquiry concerning fees or possible conflicts of interest. Nor was there any concern expressed for such matters at the district court level. If there had been, a simple admonishment to the client concerning her rights would have sufficed since conflicts are waivable and excessive fees non-collectable. Or, the court could have held an in camera hearing with the attorney to inquire into both matters without the possibility of use of the attorney's answers by the prosecution to incriminate the client. This by no means exhausts the alternatives available; the point is that they exist and would not place an attorney in the impossible posture of testifying before a grand jury as to client communications for use in a criminal prosecution.

trial discovery against the attorney's client. That is what happened below.

While distinguishable in some respects, an analogous situation to this case was presented in United States Securities & Exchange Commission, 226 F.2d 501 (6th Cir. 1955), where a lower court held in contempt the General Counsel for the SEC for declining to produce confidential intra-agency reports of the Commission's based upon the Commission's rules of privilege. In setting aside the judgment of contempt, the Court stated that even if wrong in asserting a claim of privilege "An attorney is entitled to consideration of a claimed privilege not to disclose information which he honestly regards as confidential and should not stand in danger of imprisonment for asserting respectfully what he considers to be lawful rights." Id. at 520. It is interesting to note that the General Counsel asserted the SEC's privilege in his own behalf and the Court upheld his right to do so; in the case at bar, petitioner also respectfully asserted a privilege for his client, yet petitioner was held in contempt and ordered incarcerated.

In re Marshall, 423 F.2d 1130 (5th Cir. 1970), the Court noted that the power of holding an attorney in contempt is broad but that certain guidelines should be followed. In contempt cases against lawyers, the Court stated that all of the evidence must be carefully examined in order to insure that there is "no undue interference with the attorney-client relationship." The Court cited Parmelee Transportation Company v. Keeshin, 294 F.2d 310, 313 (7th Cir. 1961) for the proposition that the contempt power must be invoked sparingly and only when clearly demonstrating conduct that is contumacious and tending to bring the administration of justice into disrepute as opposed to conduct that is of a "determined level-

headed practitioner who is acting respectfully to the court under considerable pressure in a lengthy and important trial."

In the recent decision of this Court in Maness v. Meyers, ___ U.S. ___ (1975), an attorney's contempt citation for advising his client to assert the Fifth Amendment privilege during a civil suit was overturned. Here, the attorney, acting in a professional manner, asserted the Fifth Amendment privilege, among others, on behalf of his client. [5] The language and holding of Maness v. Meyers are equally applicable here:

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[5] In several circumstances, the attorney for the privilege-holder may assert the privilege on behalf of his client. See Brody v. United States, 243 F.2d 378, 387 (1st Cir.), cert. denied 354 U.S. 923 (1957) (attorney appearing before court as counsel permitted to object to a proposed order on the ground that it would compel his client to incriminate himself). In Application of House, 144 F. Supp. 95 (N.D. Cal. 1956) the court held that the attorney could assert his client's Fifth Amendment privilege, noting that any other decision would result in the client's waiving his constitutional rights unless he himself participated in all proceedings with the attorney. (Id. at 100) In House, the court did not make a distinction between the possession of privileged documents by the attorney or the client. The court apparently equated the physical possession of the documents by the attorney in the course of his employment as possession in a personal capacity by the client himself.

"An early example of this situation is found in In re Watts & Sachs, 190 U. S. 1 (1903). There lawyers advised their clients in good faith that state not federal courts had bankruptcy jurisdiction over a certain property in the hands of a state receiver. This advice led to a collision between the state and federal courts, and contempt citations for the lawyers. Although this Court held that the lawyers' advice was substantively incorrect it refused to allow the federal contempt convictions to stand because there was no evidence the advice was given in bad faith. 190 U.S., at 32. Chief Justice Fuller, speaking for the Court, said:

> "'In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow the application of any other general rule.' 190 U.S., at 29.
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> "We conclude that an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert the Fifth Amendment privilege against self-incrimination in any proceeding embracing the power to compel testimony. To hold otherwise would deny the constitutional privilege against self-incrimination the means of its own implementation. When a witness is so advised the advice becomes an integral part of the protection accorded the witness by the Fifth Amendment."

Here, the petitioner's client had been granted use immunity for subsequent testimony before the grand jury. Subsequently, the prosecutor informed petitioner that he would be subpoenaed to testify concerning the matters testified to by his client. If there were discrepancies in the testimony, his client would be prosecuted for perjury. If not, the testimony might be used to implicate her on substantive offenses. The petitioner was certainly within the law in declining to answer grand jury questions under these circumstances based upon Fifth[6] and

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6 "In addition to hindering preparations, requiring an attorney not only to identify his client but also to divulge information that might provide a sufficient basis for a subsequent indictment by the grand jury would place him in the anomalous position of being a witness against his own client. Moreover, the knowledge that the attorney-witness has been retained to prepare for possible criminal charges might give rise to an inference of client guilt consciousness that would render the grand jurors less capable of making an objective determination of the occurrence of a criminal violation and the complicity of the client. Thus it is arguable that the client's act of retaining counsel before charges against him have been filed is testimonial in nature, and because retention of counsel might readily be construed by the grand jurors as an admission of guilt, the attorney cannot be compelled to testify without infringing his client's Fifth Amendment privilege against self-incrimination. "Criminal Procedure-Grand Jury-Attorney Work Product Consisting of Written Statements and Personal Recollection of Interviews is Privileged Against Disclosure at Federal Grand Jury Investigation," 26 Vanderbilt L. Rev. 1078, 1088 (1973).

Sixth Amendment[7] grounds as well as the attorney-client privilege[8] and the reasonable expectations

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6 cont'd "The attorney might argue successfully, however, that because disclosure of the identity of his client would lead ultimately to disclosure of the client's motive for seeking legal advice and because the client motive is within the purview of communications protected by the attorney-client privilege [citation], the client's identity need not be revealed. See Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965) (client's identity is within the attorney-client privilege when that identity is the essence of a confidential communication)." Id. at n. 50.

7 The Fifth Amendment is a broadly drawn constitutional privilege which is not especially geared to the peculiarities of the attorney-client relationship. However, there are Sixth Amendment "right to counsel" reasons for protecting the relationship. See Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), cert. denied 342 U.S. 926 (1952).

8 The attorney-client privilege is of ancient origin based upon the fundamental premise that the "necessity of ensuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily made available only when the client is free from the consequences of apprehension of disclosure. . ." Baird v. Koerner, 279 F.2d 623, 629 (9th Cir. 1960).

of the client in entering such a relationship. [9]

Neither the grant of use immunity to petitioner or his client prevents the assertion of the above grounds as a bar to testimony. Use immunity is constitutional only because it is a protection against self-incrimination which is coextensive with the Fifth Amendment. Kastigar v. United States, 406 U.S. 441 (1972). The grant of use immunity to a client is not a talisman that dissolves all constitutional rights. Here, the use immunity grant to the client is totally subverted by subpoenaing the client's attorney and compelling him to divulge communications from his client. [10]

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[9] "A transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given. Again in contrast, a transfer to a trustworthy bank or to a clerk of the court does not usually carry with it such expectations." U.S. v. Couch, 409 U.S. 322, 350 (1973)(Marshall, J. dissenting). See also Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956) ("the attorney has the duty . . . to make assertion of the privilege, . . . as a matter of professional responsibility.")

[10] The grant of use immunity to petitioner is irrelevant since he indicated that answering questions would not incriminate himself. (slip opinion at 6) In any case, where the immunity is not coextensive with the Fifth Amendment privilege, testimony may not be compelled: "If, . . . the immunity granted is not as comprehensive as the protection afforded by the privilege, petitioners were justified in refusing to answer, and the judgment of contempt must be vacated. McCarthy

In addition to rendering the use immunity grant to the client meaningless, compelling the attorney to testify against his client based upon communications during the formation of the attorney-client relationship undermines the Sixth Amendment right to counsel. Use immunity is irrelevant to the Sixth Amendment and other protections of the attorney-client relationship: "Use immunity overcomes only those testimonial privileges based on self-incrimination. The witness may well have

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10 cont'd v. Arndstein, 266 U.S. 34, 42 (1924)." Kastigar, supra at 449.

The most serious defect of Michaelson stems from the fact that the client had received only use immunity rather than transactional immunity. She clearly retained a Fifth Amendment privilege with respect to any other source of the same information. She is still vulnerable to prosecution, with the sole limitation that her own coerced testimony and its fruits cannot be used against her. The government can easily show that it had knowledge of the identity of her lawyer from a source completely independent of her. If his testimony differs from hers, she can be charged with perjury. If it is the same, the facts can be proved with an assurance that Sibson cannot contradict them. This failure to recognize the identity of interest of attorney and client is perhaps the opinion's fundamental error. The grant of use immunity to the client simply does not permit extraction of client communications from her attorney.

other statutory and constitutional claims which the court could consider at the pre-testimony hearing." Note, "Federal Witness Immunity Act: Expanding The Scope of Pretestimony Judicial Review," 5 Loyola Univ. L. Jour. 490 (1974).

The primacy of the attorney-client relationship in the analogous context of the government's power to subpoena taxpayer records in the possession of an attorney has been correctly described in United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974), cert. granted 29 January 1975.

> "We are thus faced with this dilemma: If we hold that no fifth amendment privilege is now available, then the taxpayers rights have been effectively decreased by his transfer. In a sense, the taxpayer is better off without an attorney to study the records than with him. . . . the question is whether the taxpayer has a sufficient legitimate expectation of privacy in the summoned records to warrant the label of constructive possession." Id. at 452. "But where the taxpayer transfers potentially incriminating materials which he physically possesses to his attorney pursuant to an attorney-client relationship, the taxpayer's legitimate expectation of privacy with regard to the use of materials should be quite different from his legitimate expectations as to its use in the hands of an independent accountant preparing tax returns. While the accountant has a legal duty to disclose, the attorney has a strict, ethical obligation to prevent disclosure. This ethical obligation is broader than and independent of the attorney-client privilege, which is admittedly not available here. The Disciplinary Rules of the Code of Professional Responsibility prepared by the American Bar Association

absolutely forbid an attorney from knowingly revealing either a confidence or a secret of his client. . . . . but even where there is no attorney-client privilege in certain material, as here, the taxpayer client may still have a legitimate expectation of privacy with regard to that material because of the attorney-client relationship, an expectation of privacy which helps to give substance to a Fifth Amendment privilege contention." (Id. at 453)

The propriety of a prosecutor calling a client's attorney before a grand jury to obtain evidence for a prosecution is open to serious constitutional question[11] for "prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law." U.S. v. White, 322 U.S. 694, 698 (1944).

It is no argument for the attorney to simply testify in the face of threats of contempt and later appeal. Once the protected information is revealed it cannot be retrieved:

"[o]nce the witness has complied with an order to testify, he cannot thereafter retrieve the information involuntarily revealed, even if it subsequently develops that compelling

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[11] Once a person is a target for indictment, it is improper to use the grand jury to subpoena the individual for discovery purposes. Cf. United States v. Star, 420 F.2d 1214 (9th Cir. 1972). Calling the individual's attorney to compel testimony to incriminate the client would be equally improper.

the testimony violated constitutional rights. In such a predicament, the damage is irreparable. No remedies are available which can effectively cure the constitutional deprivation after the order has been unwillingly obeyed." United States v. Dickinson, 465 F. 2d 496, 512 (5th Cir. 1972) (footnote omitted); see also Hoffman v. United States, 341 U. S. 479, 486-87 (1951).

To penalize an attorney in this extraordinary circumstance for protection of his client's interests subverts the guarantees afforded by the Fifth and Sixth Amendment. The problem is aggravated where one Circuit recognizes the impropriety of compelling an attorney to violate his ethical obligations to his client (United States v. Kasmir, supra at 453)[12] and another does not, e. g., the opinion below. Where there is doubt in the law as to what an attorney's responsibilities are, this Court has made clear[13] that the attorney must decide in favor of the client and not his own

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12 See also In re Terkeltoub, 256 F. Supp. 683, 684 (S. D. N. Y. 1966), where an attorney and client were suspected of witness tampering, the court refused to compell the attorney's testimony about an illegal meeting between the attorney, client, and the witness finding "that the attorney was not only entitled, but probably required to withhold answers to the grand jury's questions." (Emphasis added)

13 "The American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Defense Function shows the difficulty such a situation would present for a lawyer.

". . . the duties of a lawyer to his client are to represent his legitimate interests, and

personal or professional interest.

Every client is entitled to his counsel's zealous protection of attorney-client communications, secrets and the continuity of the relationship itself. If rules are adopted which permit counsel to be held in contempt for refusals to testify against his own client in a situation such in this case, [14] counsel will be faced with the obvious predicament of a conflict-of-interest between the disposition of his client's case and the very real possibility of himself being subjected to

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13 cont'd consideration of personal and professional advantage should not influence his advice or performance." Standards Relating to the Administration of Justice, 1974 Ed., at 120.

"The introductory comments note that: "A lawyer cannot be timorous in his representation. Courage and zeal in the defense of his client's interest are qualities without which one cannot perform fully as an advocate." Id., at 109-110." Quoted in Maness v. Meyers, supra, n. 16 (1975).

14 There may be isolated instances where the attorney would be lawfully compelled to testify against a client as where counsel witnesses his client attempting escape during an interview or where the latter assaults custodial personnel in front of counsel. These examples, unlike this case, are separate and apart from the attorney-client relationship.

contempt and its resultant penalties. The choice would be between attorney self-interest and the best interests of his client. To place counsel in such a position denies the client's right to the effective representation and the lawyer of his choice as commanded by the Sixth Amendment. A concommitant effect is the destruction of the confidential relationship between attorney and client.

The dilemma for the attorney is compounded where his compelled testimony, should he elect to give it, breaches his ethical obligations to the client and may lead to disciplinary action against him. It is further aggravated by the knowledge that if the case originated in California, where petitioner is licensed and practices, the rules of privilege would have protected his refusal to testify.[15] It would be an anomolous and precarious

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15 The opinion below cites Baird v. Koerner, supra, for the proposition that state law on attorney-client privilege governs the applicable law. But cf. Heathman v. United States District Court, 503 F.2d 1032, 1034 (9th Cir. 1974). The weight of authority is contra, see, e.g. ". . . questions of privilege in a federal income tax investigation are matters of federal law." Colton v. United States, 306 F.2d 633, 636 (2d Cir. 1962).

The new proposed Federal Rules of Evidence purposely were stripped of rules concerning privilege in order to avoid the mischief this case exemplifies concerning whether federal or state rules apply: "The formulation adopted by the House is pregnant with litigious mischief. The committee has, therefore, adopted what we believe will be a clearer and more practical guideline for determining when courts should respect State rules of privilege. Basically, it provides that in

state of the law to allow federal prosecutor's to subpoena lawyers before grand juries in states where the privilege is weakest. Such an abuse of the grand jury subpoena process may only be eliminated by applying a standard federal rule such as is mandated by Proposed Federal Rules of Evidence § 501. [16] Since federal policy is being furthered, federal rules should apply to the rules of privilege concerning a federal court's contempt citation for an attorney's refusal to testify against his client before a federal grand jury.

Under any rationale application of the

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15 cont'd criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced." Report of the Committee on the Judiciary of October 18, 1974, 93d Cong., 2d Sess, Report No. 93-1277, p. 12.

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Article V. Privileges

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State,

attorney-client privilege, (California, Nevada[17] or federal[18] common law) the questions asked petitioner, under this unique fact situation, called for answers concerning privileged communications.

CONCLUSION

The majority decision in Michaelson places the Ninth Circuit directly in conflict with the Fifth Circuit decision in United States v. Kasmir, supra for which a petition for a writ of certiorari was granted on 29 January 1975. 16 Cr. L. 4162. On the same day, certiorari was granted to review the decision in United States v. Fisher, 500 F. 2d 683 (3rd Cir. 1974), another taxpayer-transfer-of-records-to-his-attorney case. This case presents issues far more substantial than either Kasmir or Fisher. The practice of subpoenaing an attorney

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16 cont'd or political subdivision thereof shall be determined in accordance with State law.

17 California and Nevada statutes concerning attorney-client privileged communications are almost identical. See Pet. at 24-27. Section 1, Rule 179 of the Rules of the Supreme Court of Nevada prohibits an attorney from disclosing client secrets and confidences. California has the same rule. See this brief supra at 6-7.

18 Chirac v. Reinicker, 24 U. S. (11 Wheat.) 280, 294-295 (1826) (the fact of a retainer by a certain party for a certain purpose is a confidential communication).

before the grand jury to testify as to client communications concerning the fees to create the relationship is nationwide and occurs with disquieting frequency. E.g., United States and Joseph H. Romine, Special Agent Internal Revenue Service v. Frank E. Haddad, Civil No. 74-377 L[A] (W.D.Kty. 1974) (now on appeal to the Sixth Circuit). The majority Michaelson opinion now sanctions this practice. The dissent of Circuit Judge Merrill concisely frames the correct judicial approach to the problem.

> "I cannot, then, agree that the only limits upon what a court may require an attorney to divulge respecting his client are those prescribed by privilege and the Fifth Amendment. Where ethical considerations intervene, surrender of the information to the Government should no longer be regarded as a matter of unquestionable governmental right. Public need to obtain the information from this source should not be blindly accepted without giving consideration to the interests represented by the attorney-client relationship, and a court order should be the result of an exercise of judgment seeking to reconcile the competing interests. Absent some showing of weighty governmental need of this information from this source, in my judgment the order should not have issued." Slip opinion at 19. (Emphasis added)

The consequences for petitioner and the entire bar resulting from allowing the opinion below to stand may well prove disasterous. The opinion fails to recognize that "a grand jury subpoena is [not] some talisman that dissolves all constitutional protections." United States v. Dionisio, 410 U.S. 1 (1973). For the attorney who conscientiously seeks to follow the ethical

dictates of his profession and the Constitution, as did petitioner below, the Hobson's choice of contempt and jail, or testifying and breaching his duty to his client is untenable.

Further, the direct consequences to petitioner for his conduct in preserving his client's confidences, trust and the relationship itself, are grave. More than a jail sentence and loss of his ability to practice are at stake, for his

> ". . . conviction for contempt presumably could be used for impeachment and sentencing purposes in any future criminal proceeding. This conviction would be especially damaging if . . . [he] were ever again accused of being in contempt of court. Conviction for contempt of court could also have serious adverse career consequences for . . . [him]. His conviction could provide a basis for disciplinary action by a bar association. Opportunities for appointment to the bench or to other high office might be foreclosed as a result of this blot upon his record. The conviction might damage . . . reputation in the legal community, and this in turn might affect his ability to attract clients and to represent them effectively, especially in open court." In re Butts, 493 F. 2d 842, 844 (5th Cir. 1974)

The dismal irony of witnessing an attorney disciplined by the bar because of a contempt citation for refusing to testify against his client, or alternatively disciplined for failure to preserve his client's confidences, secrets and trust cannot be lost upon this Court. All this, of course, is

in store for petitioner individually. However, the issues raised by his petition for certiorari are of such grave consequence to every lawyer in this nation, that this Court should grant his petition and hear this case on the merits.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1011

ALVIN S. MICHAELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The principal question raised by the petition is whether petitioner, an attorney, was required to testify before a grand jury concerning the fee arrangements pertaining to his representation of a client.

Petitioner was convicted in the United States District Court for the District of Nevada of civil contempt for refusing, in violation of 28 U.S.C. 1826, to comply with a court order to answer questions before the grand jury, and was sentenced to imprisonment for the duration of that term of the grand jury.[1] The court of appeals affirmed (Pet. App. A).

The pertinent facts are as follows: Brenda Marie Sibson was called as a witness in a grand jury investigation into hashish smuggling. Although she first claimed indigency and asked to have counsel appointed for her, she thereafter fired her appointed counsel and retained petitioner to represent her. Upon her appearance before

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[1]Petitioner has been admitted to bail pending appeal. The term of the grand jury will continue until the end of this year.

the grand jury, Ms. Sibson was given use immunity pursuant to 18 U.S.C. 6002. Under questioning, she acknowledged accompanying the chief suspect and others on trips abroad, but denied having knowledge of any arrangements made during those trips concerning hashish. She was then asked who arranged and paid for her representation by petitioner. In response, she stated that she made the arrangement, that no one else was paying his fee, and that she had paid him $75. However, Ms. Sibson refused to answer any further questions on the subject on the grounds of attorney-client privilege (Pet. App. A 4).

Petitioner was then subpoenaed and, after his motion to quash was denied, he was given use immunity and was ordered "to give testimony respecting unprivileged communications with his client" (Pet. App. A 4, n. 1). The prosecutor thereupon put nine specific questions to petitioner before the grand jury concerning his fee arrangements with Ms. Sibson, which he refused to answer.[2] The contempt citation followed.

1. The court of appeals correctly affirmed petitioner's adjudication in civil contempt. As the court noted (Pet. App. A 9), absent unusual circumstances, it is well established that the attorney-client privilege does not protect disclosure of the identity of a client, the conditions of employment, the amount of the fee and who paid

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[2]The questions were as follows (Pet. App. A 4-5):

1. Q. Did anyone refer Miss Sibson to you?
2. Q. Did you discuss a fee arrangement with Miss Sibson?
3. Q. Did any other individual besides Miss Sibson ever discuss with you a fee arrangement for your representation of Miss Sibson?
4. Q. What is your fee arrangement with Miss Sibson?
5. Q. How much money have you received from Miss Sibson?
6. Q. Have you received any money from any other person besides Miss Sibson to represent Miss Sibson?
7. Q. Have you received any funds from Miss Sibson?
8. Q. Have you made arrangements with Miss Sibson to pay your expenses?
9. Q. Have you made an arrangement with any other person besides Miss Sibson for the payment of your expenses to represent her?

it. See, *e.g.*, *United States* v. *Cromer*, 483 F.2d 99, 102 (C.A. 9); *In re Semel*, 411 F.2d 195, 197 (C.A. 3), certiorari denied, 396 U.S. 905; *Wirtz* v. *Fowler*, 372 F.2d 315, 332-333 (C.A. 5); *Colton* v. *United States*, 306 F.2d 633, 637 (C.A. 2), certiorari denied, 371 U.S. 951; *United States* v. *Pape*, 144 F.2d 778, 782-783 (C.A. 2), certiorari denied, 323 U.S. 752; *Mauch* v. *Commissioner*, 113 F.2d 555, 556-557 (C.A. 3). The specific information requested from petitioner did not relate to a confidential communication from his client. As the court of appeals observed (Pet. App. A 10), the courts have the right to inquire into fee arrangements to protect against suspected conflicts of interest. If an attorney is paid by someone other than his client, there is a possibility that the attorney may in fact be representing the interests of the person making the payment rather than the client. In such circumstances, the court must be able to satisfy itself that no conflict exists and that the attorney is discharging his duty of loyalty to the client. Here, the questions put to petitioner before the grand jury concerning his fee arrangements with Ms. Sibson were for the purpose of determining the identities of other persons participating in hashish smuggling—an inquiry within the proper scope of the grand jury investigation.

2. Contrary to petitioner's assertion (Pet. 20-22), there is no Fifth Amendment privilege available to excuse his refusal to answer the prosecutor's questions concerning his fee arrangements with his client. Assuming *arguendo* that petitioner's answer would have tended to incriminate either himself or his client, the court of appeals noted (Pet. App. A 11) that both of them were granted use immunity prior to the time petitioner was instructed to answer the question. Immunity from use and derivative

use is, of course, sufficient to compel testimony over a claim of the privilege. *Kastigar* v. *United States*, 406 U.S. 441, 453.[3]

Moreover, there is no conflict between the decision below and *United States* v. *Kasmir*, 499 F.2d 444 (C.A. 5), certiorari granted, January 27, 1975, No. 74-611 (Pet. 16-18). There, the court held that the Fifth Amendment could be invoked by an attorney as a ground for refusing to comply with an internal revenue summons requiring the production of an accountant's workpapers relating to the preparation of the claimant's tax returns. In *Kasmir*, the accountant transferred his papers to the claimant who in turn handed them over to his attorney after the commencement of a tax investigation. While we believe the court's decision was erroneous, that decision turned upon the court's conclusion that the privilege against self-incrimination was available to bar the disclosure of the accountant's workpapers rather than upon the fact that the claimant transferred the summoned documents to his attorney. As that court stated, "We reject the motion, as we did in *White* [477 F.2d 757, affirmed *per curiam en banc*, 487 F.2d 1335, certiorari denied, October 15, 1974, No. 73-1308] that a Fifth Amendment privilege in the taxpayer can somehow be *created* when evidence finds its way into his attorney's hands" (499 F.2d at 452). And here, by contrast, the grant of use immunity to both the lawyer and the client extinguished any possible availability of the privilege.

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[3]Petitioner (Pet. 9-10) and the *amicus* (Br. 2) argue that the government attorney informed him that his answers to the questions would be used to incriminate his client on the substantive offenses underlying the grand jury investigation, *viz.*, the hashish smuggling. However, quite the contrary is the case. Petitioner was told his answers were sought only with respect to a possible indictment of his client for conspiracy to obstruct justice by giving false testimony to the grand jury and for perjury. Nothing in the immunity statute, 18 U.S.C. 6002, prevents the bringing of such charges, for that statute explicitly excepts prosecutions for "perjury, giving a false statement, or otherwise failing to comply with the order [to testify]." If petitioner's client made false statements to the grand jury, she has no Fifth Amendment privilege to prevent him from testifying as to information which did not relate to a confidential communication from her, even if his testimony may establish the falsity of her statements.

Contrary to petitioner's argument (Pet. 14), the Sixth Amendment right to counsel has never been construed to bar disclosure of all evidence in the hands of an attorney. Thus, the mere fact that petitioner has certain information which came into his possession while acting as an attorney does not automatically insulate it from disclosure unless either the Fifth Amendment or the attorney-client privilege is available. Since the court below correctly concluded that neither privilege was applicable, *Kasmir* is distinguishable.[4]

3. Finally, petitioner urges (Pet. 31-35) that the requirement of 28 U.S.C. 1826 that appeals from civil contempt orders be disposed of within 30 days deprived him of due process of law. The purpose of the civil contempt remedy, which is to encourage compliance with court orders, justifies the expedited procedure established by the statute. If appeals from civil contempt orders consumed long periods of time, the efficacy of court orders would be undermined even if the orders ultimately were held to be valid. Although the briefing schedule in such a case is curtailed, petitioner was not forced to work under more stringent time limitations than the government. While this schedule had the effect of foreclosing petitioner from seeking rehearing *en banc*, it did not preclude him from seeking *en banc* consideration as an initial matter.

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[4]Petitioner also argues (Pet. 24) that the decision below is in conflict with *Colton* v. *United States*, 306 F.2d 633, 636 (C.A. 2), certiorari denied, 371 U.S. 951. There, the court held, *inter alia*, that questions of attorney-client privilege in a federal income tax investigation are matters of federal law. In so holding, the court expressly disagreed with the Ninth Circuit's decision in *Baird* v. *Koerner*, 279 F.2d 623, which, like the decision below, looked to the state law concerning the privilege. But this case is not appropriate for resolution of the asserted conflict because petitioner makes no showing that federal law would have yielded a different result. Indeed, petitioner concedes (Pet. 24, n. 14) that "[t]he laws of California, Nevada, and the Federal Courts are nearly identical with respect to the extent of the attorney-client privilege."

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

DOJ-1975-05